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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91206495
Party	Defendant Amy Gurvey
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Date	03/09/2015
Attachments	TTAB Response Coggins March 9 2015.pdf(369967 bytes) 2d Cir Order Gurvey v. Cowan 2-10-12.pdf(104987 bytes) USDC Cowan Award Of Arbitrator.pdf(123840 bytes) TTAB SDNY Nov 17 2014 Order re 6AC.pdf(145978 bytes) 2d Cir Stay of Appeal Pending 6AC Motion to Compel Disc 1927 Sx Feb 25 2015.pdf(319862 bytes) TTAB Response SDNY 6AC March 9 2015.pdf(3418171 bytes) DOJ TM LN Competitive Impact Stmt 2010.pdf(255505 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEALS BOARD

SIGNAL SHARE, LLC,)	Opposition No. 91206495
)	
Opposer,)	RESPONDENT'S RESPONSE TO ORDER
)	
vs.)	
)	Interlocutory Attorney: Hon. Robert H. Coggins
)	
AMY GURVEY,)	
)	
Respondent.)	

Amy R. Gurvey, the "Respondent" in the instant TTAB ("Board") proceeding, who was previously represented only for continuing patent prosecution by the law firm of Ohlandt Greeley, Ruggiero & Perle (hereinafter "OGRP") until this proceeding was filed by Opposer SignalShare ("Opposer"), hereby answers and responds to the order of Hon. Robert H. Coggins entered on February 5, 2015 and also submits the SDNY and 2d Circuit documents requested by the Board in said order.

Before answering the Board's order, Respondent respectfully advises the Board that Respondent has been attempting to e-file the instant response since the due date of Saturday, March 7, 2015. Respondent was previously issued passwords by the USPTO Business Center in 2014 for use on her continuing patent prosecutions that have not worked. On Monday, March 9th, 2015 Respondent called the TTAB to get further instructions to e-file the instant response along with the PDF exhibits requested by the Board. Respondent has been issued two Reference Nos. 1-322954497 (Laquada); 1-322964761 (Dwayne) on the morning of March 9, 2015 at 8:31 a.m. and 8:53 a.m. respectively.

Now, in support of her answer and response, Respondent declares to the truth of the following statements under penalty of perjury.

1. Respondent Amy Gurvey is an inventor-entrepreneur and President of Founder of LIVE-Fi™ Technologies/LIVE-Fi™ Productions, LLC since 2005. LIVE-Fi™ Technologies, LLC was incorporated in the State of Delaware in 2005. The LIVE-Fi™ registered marks in categories 9, 38 and 41 have been in use since before the companies were organized in 2005.

2. In its order of February 5, 2015, this Board has requested information and documents from Respondent concerning her federal attorney patent misconduct lawsuit. *Gurvey v. Cowan Liebowitz & Latman, PC, et al.*, 06-cv-1202 (SDNY) has been pending before SDNY since 2006, and in 2012 the Second Circuit upheld Respondent's claims over sua sponte dismissal. Defendants filed Rule 12(b) motions; and did not file any answer prior to appeal. Respondent appeared *pro se* in that successful appeal. The Second Circuit upheld Respondent's patent malpractice, breach of fiduciary duty and breach of attorney client privilege claims against the firm. ¹

3. The District Court held on November 17, 2014 that Respondent's most recent amended complaint that is based on Cowan's first document production in December, 2012 and 2014 notices from the USPTO General Counsel, must be adjudicated before any disposition motions can be made in the lawsuit. This demonstrates that Opposer's most recent papers and exhibits referring to previous orders from the Magistrate are moot and a red herring. Respondent previously also won SDNY Arbitration against the Cowan firm on all counts in 2009. For some reason the Arbitrator Award was not docketed, which is a matter being investigated by the SDNY Grievance Panel. The relevant orders are appended.

(Exhibit 1)

4. Moreover, as mentioned in para. 3, above, in June, 2014, prior to entry the operative orders of the District Court, the USPTO General Counsel noticed that the Cowan firm is under ongoing investigation for potentially criminal misconduct in connection with Respondent's patent retainer.

(Exhibit 2) This demonstrates why it has been very difficult for Respondent to retain replacement patent

¹ 462 Fed. Appx. 26 (Feb 10 2012)

and trademark counsel; and why OGRP withdrew from Respondent's representation without returning Respondent's files. OGRP told Respondent it did not want to be involved in the Cowan lawsuit or be a witness in that case. Respondent still does not have her non-public patent files from OGRP or all her trademark files. In the instant proceeding, the Court is faced with an unusual fact pattern whereby a potential infringer of LIVE-Fi™ patents is also using LIVE-Fi™'s registered marks.

5. In December, 2012 on remand to the SDNY, Respondent got her first discovery from the Cowan firm after 7 years. The production was sorely incomplete and unresponsive. Cowan's attorney then filed untruthful Rule 26(a) disclosures.

6. Respondent's additional motions since 2013 before SDNY including to get signed subpoenas against OGRP and other NY attorneys to recover unlawfully withheld non-public USPTO files, to compel outstanding discovery, and to amend her complaint have still not yet been adjudicated. Nor has Respondent's motion for Rule 28 USC 1927 sanctions against Cowan and its defense firm been adjudicated for continuing the lawsuit without merit and submitting altered patent evidence to the Court since 2006. It has become clear that altered patent evidence was submitted by the defense to conceal the "potentially criminal misconduct" noticed by the USPTO General Counsel. Plaintiff's important motions have still not been adjudicated after two years.

7. Second Circuit requested updates every 30 days on the status of discovery and Respondent's amended pleading. Respondent's most recent update to Second Circuit was filed in February, 2015. It is appended (**Exhibit 3**). This explains why Respondent still does not have all her non-public patent and trademark files returned. The SDNY lawsuit and her European Patent Office ("EPO") patent prosecution with attorneys in the US and Germany continued through 2015 took a good deal of her time and resources.

8. Respondent's amended claims against the Cowan firm now include, *inter alia*, fraud in the inducement, theft of Respondent's \$50,000 patent retainer, unlawful retention and purging of

Respondent's efiles and patent files, intentionally withholding what it knew to be essential patent services under Respondent's retainer including waiving Respondent's expedited prosecution rights to get her issued US patent claims by 2004, breach of contract, breaching Respondent's attorney client privilege, allowing other clients to induce breach of fiduciary duty to Respondent, unlawfully disseminating Respondent's confidential inventions and ideas before commencing any work under Respondent's earlier patent retainer, and then abandoning Respondent's USPTO representation three weeks prior to the date formal patent applications were due for an "*admitted conflict of interest*". The nature and source of the admitted conflicts was never disclosed.

9. In addition, because the Cowan firm committing forgery on the USPTO withdrawal form and did not effect service, the USPTO Commissioner, Hon. Wynn Coggins, noticed that Respondent's patent applications would have to be taken out of the queue for prosecution in due course until the issue of Cowan's improper attempt at withdrawal was resolved to USPTO's satisfaction.

10. Cowan's USPTO withdrawal notice allegedly filed in 2003 noticed only one of two patent applications the firm filed in Respondent's sole name. However, after filing two draft provisional applications in May, 2002 and never filing Respondent's long-form drafts, schematics, drawings, specifications and draft claims that the firm had since December, 2001, Respondent was issued her first two US patents based on those disclosures in 2009 and 2011 respective, an unprecedented 8-9 years after Cowan was retained to protect the relevant inventions. Respondent is also sole inventor of 21 related and novel CIP and divisional patent applications that remain pending before the USTPO and EPO. All applications have the benefit of an early May 22, 2002 priority date. Respondent's patents and pending applications before the USPTO and EPO disclose end-to end solutions for expanded event ticketing and registration operations, authenticated legal distribution of event and broadcast content to users, live audience members and broadcast viewers, and associated systems that enable viewer/audience interaction, apparatuses and advertising/sponsorship solutions.

11. The Cowan firm also somehow waived Respondent's right to expedited prosecution within 24 months and did not ever advise Plaintiff she had those rights, and then abandoned Plaintiff three weeks before formal applications were due, causing a 7-year hiatus before Plaintiff even got a patent office action.

12. Opposer herein is believed to be infringing Respondent's issued patents and patents pending. Respondent believes that the instant proceeding claiming Opposer's first use of LIVE-Fi™ marks on September 13, 2009 - exactly one month before Respondent's first US patent issued - seems to be more than a coincidence. This proceeding, therefore, was likely filed to harass Respondent because of Opposer's concern that it is infringing Respondent's patents.

13. Upon belief, Opposer is acutely aware that LIVE-Fi™'s proprietary technology solutions, expanded ticketing and authenticated content distribution methods have been marketed since 2004 including to other clients of the Cowan firm such as Live Nation, Inc. Live Nation, the surviving entity of Clear Channel Entertainment Spingo in 2004, got prior, unlawful access to Respondent's confidential inventions in 2003 with the Cowan firm serving as Live Nation's NY agent. Respondent's confidential inventions, ideas and terms of art such as to "capture otherwise live lost content" were printed in an article in the *New York Times* Business Section on Monday, May 5, 2003, with Clear Channel introducing a new entity, Instant Live Concerts, LLC. Instant Live was then acquired by Live Nation in 2005 and a third-party inventor's recording patent that Live Nation acquired in the interim period, was then invalidated before the USPTO on motion of the Electronic Frontier Foundation in 2007. In the meantime, Live Nation was issuing false intentional press releases that it owned a monopoly on distributing live concert recordings.

14. Cowan's other mega-clients unlawfully outsourcing Respondent's patents relevant to this proceeding include MLB/MLB Advanced Media (owner of Ticket.com), Phish, and Ticketmaster (now part of Live Nation Entertainment, Inc.) Ticketmaster became merged with Live Nation in 2010 after

highly publicized proceedings involving the Dept. of Justice and 18 US states. The merged entity is now bound to a consent decree and competitive impact statement through 2020 issued by the DC District Court. (Exhibit 5)

15. Respondent offers the following qualifying factual information based on the order of the Board.

16. OGRP firm was retained in 2011 to continue and complete prosecution of the patent portfolio. It was never retained for trademark work and began trademark work without Respondent's consent after the instant proceeding was filed by Opposer.

17. When this proceeding was filed by Opposer, Respondent immediately moved before SDNY for signed subpoenas against OGRP and other NY attorneys. This is because partner Charles Ruggiero, Esq. refused to return Respondent's non-public patent files and her trademark files relevant to this proceeding. Ruggiero converted and stole Plaintiff's retainer monies and used them to assign other attorneys to defend this proceeding, when his firm was never retained to represent Plaintiff's interests in trademark matters.

18. In 2014, when the USPTO General Counsel noticed Respondent that the Cowan firm has been under ongoing investigation for potentially criminal misconduct in connection with Respondent's patent retainer, Ruggiero continued to refuse to return Respondent's files, believing they could be evidence against the Cowan firm. He and his firm say they know some of the innocent partners at the firm. OGRP's withholding Respondent's relevant files made it even more difficult for Respondent to retain an attorney to take over on both the patent prosecutions and to represent her in this proceeding. In fact, Ruggiero confirmed several times that the previous attorneys made a mess of Respondent's patent files by failing to timely perfect two provisional applications filed for Respondent as PCT and US applications. One of the firms put Respondent's original 2003 draft claims given to Cowan to edit in 2001, into the 2005 EPO and US CIP applications such that the two applications did not match.

19. In 2013, Respondent retained another US attorney with contacts in Europe to fix the EPO application to get out the claims filed in 2003, as amended in 2005. These claims may now finally issue after 12 years. That attorney was supposed to also represent Respondent in the instant trademark proceeding, but based on other commitments is unable to do so.

20. However, it took close to 18 months for the European firm's associate, Stacey Farmer, Esq. of the Grund firm in Germany, to work with Respondent and fix the mess made by the Cowan and subsequent US firms, and to get the EPO application in proper form for issuance before that Office.

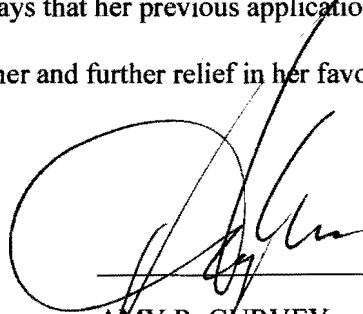
21. For these reasons, Respondent is now forced to appear pro se in the instant trademark opposition proceeding.

22. Opposer filed a recent application to resume proceedings. This demonstrates that there can be no prejudice to Opposer if Respondent's previous application for an extension of time is granted. It is contended that Opposer continues to use Respondent's marks unlawfully.

23. However, at the appropriate time, Opposer will be forced to answer for both patent and trademark infringement and for filing the instant proceeding in bad faith.

WHEREFORE, Respondent prays that her previous application for an extension of time be granted and that the Board grant such other and further relief in her favor as it deems just and proper.

Dated March 7, 2015
Upper Montclair, NJ

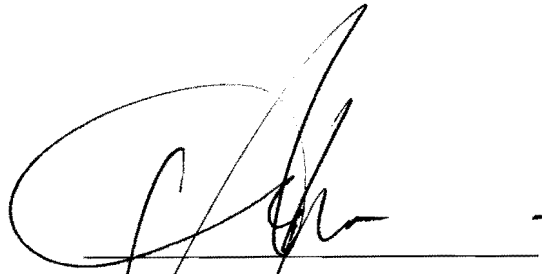
A handwritten signature in black ink, appearing to read 'Amy R. Gurvey', is written over a horizontal line. To the right of the signature, there is a small arrow pointing to the right.

AMY R. GURVEY
Respondent *pro se*
315 Highland Avenue
Upper Montclair, NJ 07043
EMAIL: amygurvey@verizon.net
PHONE: (973) 655-0991
FAX (973) 655-0992

CERTIFICATE OF SERVICE

Amy R. Gurvey, the Respondent *pro se* herein, certifies that on March 9th, 2015, she served a true and accurate copy of the within Respondent's Response to the February 5, 2015 order of the TTAB by efilng with the USPTO TTAB, by email, and also by depositing a true and accurate copy of Respondent's Response in a mailbox duly maintained by the US Postal Service via Priority Mail, postage prepaid, in an envelope addressed to the attorney of record for Opposer Signal Share in this proceeding. The envelope was addressed as follows:

Eric Stevens, Esq.
(Attorney of Record for Opposer Signal Share)
Poyner Spruill, LLC
PO Box 1801 (27062-1801)
301 Fayetteville Street, Suite 1900
Raleigh, NC 27601
estevens@poynerspruill.com



AMY R. GURVEY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of February, two thousand twelve.

PRESENT:

AMALYA L. KEARSE,
JOSÉ A. CABRANES,
ROBERT D. SACK,
Circuit Judges.

-----x
AMY R. GURVEY,

Plaintiff-Appellant,

-v.-

Nos. 09-2185-cv(L)
10-4111 (Con)

COWAN, LIEBOWITZ & LATMAN, P.C., CLEAR
CHANNEL COMMUNICATIONS, INC., LIVE
NATION, INC., INSTANT LIVE CONCERTS, LLC,
NEXTICKETING, INC., WILLIAM
BORCHARD, MIDGE HYMAN, BAILA
CELEDONIA, CHRISTOPHER JENSEN, DALE
HEAD, STEVE SIMON, MICHAEL GORDON,
and SUSAN SCHICK,

*Defendants-Appellees.*¹
-----x

¹ The Clerk is directed to amend the official caption as indicated above.

1 **FOR APPELLANT:**

Amy R. Gurvey, *pro se*, Upper
Montclair, N.J.

4 **For APPELLEES:**

J. Richard Supple, Jr., Hinshaw &
Culbertson LLP, New York, N.Y.,
for Cowan, Liebowitz & Latman
PC, William Borchard, Midge
Hyman, Baila Celedonia, and
Christopher Jensen;

Samara L. Kline (Melissa
Armstrong, *on the brief*), Baker
Botts LLP, Dallas, Texas, *for* Live
Nation, Inc., InstantLive
Concerts, LLC, NexTicketing,
LLC, and Clear Channel
Communications, Inc.

19 Appeal from a judgment of the United States District Court for the Southern District of New
20 York (Barbara S. Jones, *Judge*).

22 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
23 **DECREED** that the judgment of the District Court be **AFFIRMED in part** and **VACATED and**
24 **REMANDED in part.**

25 Plaintiff-appellant Amy R. Gurvey appeals from the District Court’s April 23, 2009 judgment
26 dismissing her third amended complaint (“TAC”) pursuant to Fed. R. Civ. P. 12(b)(6). We assume the
27 parties’ familiarity with the underlying facts and the procedural history of the case, some of which we
28 briefly reiterate here.

29 **BACKGROUND**

30 In February 2006 Gurvey filed her initial complaint in this action, principally asserting claims of
31 misappropriation of trade secrets against all defendants named in the complaint, fraud and breach of
32 fiduciary duty against her attorney, Cowan, Liebowitz & Latman LLC (“Cowan”), and unfair

1 competition and interference with prospective economic advantage against Cowan, Clear Channel
2 Communications (“CCC”), InstantLive, and Live Nation, Inc. (“Live Nation”). Gurvey did not serve
3 the complaint on the defendants at that time.

4 Four months later, in June 2006, Gurvey filed an amended complaint, which added a subsidiary
5 of CCC as a defendant, as well as, *inter alia*, claims of malpractice against Cowan. Gurvey served the
6 first amended complaint on all defendants, and attached a copy of the original complaint.

7 Later, on March 4, 2008, Gurvey filed her third² amended complaint, which forms the basis of
8 this appeal. The TAC added as defendants several partners of and one associate employed by Cowan
9 (together with Cowan, the “Cowan Defendants”), several executives of the corporate defendants, and
10 Michael Gordon, the bass guitarist for the rock band “Phish.” The TAC also asserted numerous claims
11 against various defendants for, *inter alia*, misappropriation of trade secrets, unfair competition, breach of
12 fiduciary duty, tortious interference with a contract, tortious interference with prospective economic
13 relations, attorney malpractice, violations of Section 2 of the Sherman Act,³ violations of state antitrust
14 laws, and violations of the Lanham Act.⁴

15 On April 23, 2009, the District Court dismissed the TAC in its entirety.⁵ *Gurvey v. Cowan*,
16 *Liebowitz & Latman, P.C.*, No. 06 Civ. 1202, 2009 WL 1117278 (S.D.N.Y. Apr. 24, 2009) (“*Gurvey IP*”).

² Gurvey, who filed her initial complaint *pro se*, moved on October 10, 2006 to file a second amended complaint. While that motion was still pending, Gurvey retained counsel and requested leave to file a third amended complaint. The District Court granted permission to file a third amended complaint, deeming the *pro se* motion moot. *Gurvey v. Cowan, Liebowitz & Latman*, No. 06 Civ. 1202, Docket No. 41, at 2 (S.D.N.Y. Jan. 23, 2008) (order granting permission to file third amended complaint).

³ 15 U.S.C. § 2, *et seq.*

⁴ 15 U.S.C. § 1051, *et seq.*

⁵ On March 16, 2009, the District Court dismissed the action against CCC and Live Nation for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2). *See Gurvey v. Cowan, Liebowitz & Latman, P.C.*, No. 06 Civ. 1202, 2009 WL 691056 (S.D.N.Y. Mar. 17, 2009) (“*Gurvey P*”). Although Gurvey claims that this dismissal constituted reversible error, she failed to include in her Notice of Appeal her intent to appeal from this order. *See Gurvey*, No. 06 Civ. 1202, Docket No. 83 (S.D.N.Y. Sept. 23, 2010) (Notice of Appeal). We therefore do not have jurisdiction to decide her claim that the District Court erred by dismissing her claims against CCC and Live Nation for lack of personal jurisdiction. *See Shradar v. CSX Transp., Inc.*, 70 F.3d 255, 256 (2d Cir. 1995).

1 The court determined that Gurvey's claims of misappropriation of trade secrets, unfair competition, and
2 tortious interference with contract claims were time-barred. The court also determined that her state
3 and federal antitrust claims, as well as her unjust enrichment claim, had been inadequately pleaded. It
4 further found that Gurvey's false advertising claims under the Lanham Act were related to the
5 authorship of her allegedly proprietary ideas and therefore were not properly the subject of an action
6 under the Lanham Act.

7 With respect to Gurvey's claims for tortious interference with prospective economic relations,
8 the court concluded that Gurvey's allegations—that, because Cowan illegally revealed her proprietary
9 information and trade secrets to CCC and Live Nation, she lost the opportunity to complete a private
10 placement offering of securities to be issued by her own company—were too vague to give rise to a
11 plausible claim for relief. The court determined that the TAC neglected to allege that defendants knew
12 of Gurvey's private placement opportunity when they allegedly wrongfully interfered with the
13 opportunity, and therefore dismissed the tortious interference claim.

14 Finally, with respect to Gurvey's legal malpractice claims against the Cowan defendants, the
15 court concluded that Gurvey had offered only "vague and non-actionable challenges" to defendants'
16 legal representation. Gurvey's allegation that defendants had failed to protect the confidentiality of her
17 trade secrets was not premised on "anything more than speculation" and did not present a challenge to
18 the actual quality of defendants' legal representation. In addition, Gurvey's allegation of a conflict of
19 interest did not include any detail as to the supposed conflict. Moreover, the court determined that
20 Gurvey had failed to identify the precise damages she had suffered or how defendants' legal
21 representation had actually caused these damages. Gurvey's breach of fiduciary duty claims against the
22 Cowan defendants were dismissed for similar reasons.⁶

⁶ The District Court also dismissed Gurvey's claim for an accounting because an accounting is a remedy, not a separate claim.

On appeal Gurvey argues that the District Court abused its discretion by (1) failing to adjudicate her April 2010 Rule 60(b) motion which, *inter alia*, sought leave to file a fourth amended complaint; (2) dismissing her claims against the defendants for misappropriation of her trade secrets, violation of the federal and state unfair competition and antitrust laws, tortious interference with her contractual and business relations, and attorney malpractice and breach of fiduciary duty; (3) not issuing a formal order with respect to the Cowan defendants' motion to compel arbitration and stay all proceedings pending arbitration; (4) failing to enter on the docket and adjudicate her requests to "reinstate" discovery; (5) granting Live Nation's and CCC's motions to dismiss for lack of personal jurisdiction; (6) finding that defendants did not engage in unfair competition by issuing false and misleading press releases; and (7) dismissing her claims against Cowan for ongoing malpractice and breach of fiduciary duty before the United States Patent and Trademark Office and for tortious interference with her contract with her previous employer, Legend Films.⁷ Gurvey has also moved to correct the record on appeal, requesting that we order the District Court to docket various documents she has unsuccessfully attempted to file with the District Court during the pendency of this appeal, including a record of a state arbitration proceeding and a motion filed pursuant to Fed. R. Civ. P. 60(b), and that we order the District Court to permit her to file a fourth amended complaint (which she has also unsuccessfully attempted to file with the court). The Cowan defendants have petitioned for fees and costs, requesting that Gurvey be required to pay their expenses associated with the defense of the instant appeal.

⁷ Gurvey also appeals from the District Court's denial of her motion for reconsideration of dismissal pursuant to Fed. R. Civ. P. 59(a). *See Gurvey*, No. 06 Civ. 1202, Docket No. 80 (S.D.N.Y. Sept. 20, 2010) (order denying motion to reconsider). In adjudicating Gurvey's Rule 59 motion, the District Court found that several of the arguments she made in her motion were newly raised. The court accordingly refused to consider those arguments. *Gurvey*, No. 06 Civ. 1202, Docket No. 80 (S.D.N.Y. Sept. 20, 2010) (order denying motion to reconsider); *see Nat'l Union Fire Ins. Co. of Pittsburgh v. Stroh Cos., Inc.*, 265 F.3d 97, 115 (2d Cir. 2001) (noting that under Local Rule 6.3 of the Southern District of New York, a plaintiff may not raise a new argument for the first time in a motion for reconsideration). Because the arguments were not properly presented to the District Court, they are not before us now. *See Nat'l Union Fire Ins. Co.*, 265 F.3d at 115-16. To the extent the District Court rejected any earlier-raised arguments in its denial of Gurvey's motion for reconsideration, those arguments are addressed in tandem with, and subsumed by, our discussion of the court's dismissal of Gurvey's complaint on the merits.

1 DISCUSSION

2 We review *de novo* a dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6),
3 “construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing
4 all reasonable inferences in the plaintiff’s favor.” *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d
5 Cir. 2002). The complaint must plead “enough facts to state a claim to relief that is plausible on its
6 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although all allegations contained in the
7 complaint are assumed to be true, this tenet is “inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 129
8 S. Ct. 1937, 1949 (2009). A claim will have “facial plausibility when the plaintiff pleads factual content
9 that allows the court to draw the reasonable inference that the defendant is liable for the misconduct
10 alleged.” *Id.*

11 Having conducted an independent and *de novo* review of the record in light of these principles,
12 and for substantially the reasons stated by the District Court in its thorough and well-reasoned opinion
13 and order of April 2009, *Gurvey II*, 2009 WL 1117278, we affirm the judgment to the extent that it
14 dismissed Gurvey’s claims for misappropriation of trade secrets, unfair competition, and tortious
15 interference with contract as time-barred, and to the extent that it dismissed her claims for false
16 advertising, violations of state and federal antitrust laws, and tortious interference with prospective
17 economic relations, for failing to sufficiently plead claims upon which relief may be granted.

18 However, we vacate the District Court’s judgment to the extent that it dismissed Gurvey’s
19 claims for attorney malpractice and breach of fiduciary duty against the Cowan defendants. Construing
20 the TAC liberally, accepting all the factual allegations in the complaint as true, and drawing all
21 reasonable inferences in Gurvey’s favor, *see Bell Atl. Corp.*, 550 U.S. at 570, we conclude that Gurvey
22 stated a plausible claim by alleging that the defendants used the information given to them as part of a
23 confidential attorney-client relationship to their own advantage by disclosing it to other clients who then

1 profited therefrom to Gurvey's detriment, *see Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*,
2 56 A.D.3d 1, 10 (1st Dep't 2008).⁸ We therefore remand the cause for further proceedings before the
3 District Court on these claims.

4 We deny Gurvey's motion to correct the record on appeal, having found that the documents she
5 asks this Court to consider either were not properly filed with the District Court or concern events that
6 occurred subsequent to the District Court's dismissal of her claims. *See generally* Fed. R. App. P. 10(e)
7 (setting forth procedure for correction of record on appeal). We also deny the request of the Cowan
8 defendants for an award of appellate costs and fees. *See* Fed. R. App. P. 38; *Schiff v. United States*, 919
9 F.2d 830, 834 (2d Cir. 1990).

10 We have reviewed Gurvey's remaining arguments and find them to be without merit.

11 CONCLUSION

12 For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED in part and
13 VACATED in part as specified above. The cause is REMANDED to the District Court for further
14 proceedings consistent with this order, including discovery on the remaining claims and any possible
15 dispositive motions that may thereafter ensue.

17 FOR THE COURT,
18 Catherine O'Hagan Wolfe, Clerk of Court
19

⁸ The plausibility of this argument is bolstered by Gurvey's allegation that Cowan withdrew from representing Gurvey before the United States Patent and Trademark Office due to what Cowan allegedly termed a "conflict of interest."

**THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK**

Arbitration for Disputes Among Lawyers

In the Matter of the Arbitration between:

Re: Amy R. Gurvey,	Claimant,
-against-	
Cowan, Liebowitz & Latman, P.C.,	Respondent.

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated as of January 15, 2002, and having been duly sworn, and having heard the proofs and allegations of the parties, do hereby, AWARD, as follows:

1. Claimant Amy R. Gurvey ("Gurvey") and respondent Cowan, Liebowitz & Latman, P.C. ("Cowan") entered into a Memorandum Agreement as of January 15, 2002 (the "Agreement") by which Gurvey was hired as counsel to Cowan, the term commencing on February 15, 2002 and ending December 31, 2002. Gurvey's base compensation "for the balance of calendar year 2002" was "at the rate of \$150,000 per year, payable every two weeks...."
2. This arbitration was commenced in April 2008 by Gurvey, and the hearings were conducted over a two day period, March 23 and 24, 2009. Only two witnesses testified: Gurvey on her own behalf and William Borchard, who was called by claimant as an adverse witness. Gurvey's basic claim was breach of the Agreement, and Cowan's counterclaim alleged fraudulent inducement by reason of Gurvey's misrepresentations concerning her background, skills and experience. At the hearing, Cowan broadened its counterclaim to assert misrepresentations and material omissions concerning anticipated billings, receipt of a salary from one of her clients, claims made on her resume, sanctions for frivolous litigation misconduct, and her receipt of Social Security disability payments.
3. In May 2002 Gurvey was terminated by Cowan. Although there is no writing that spells out the reasons for the termination--which took place only weeks after the Agreement was actually executed by the parties on or about April 17, 2002--the Managing Partner of Cowan at the time of the events in question testified that "[I]t was not working out at any level." He went on to elaborate that Gurvey's fees and billings were inadequate, that she had failed to bring the firm the entertainment practice that it sought and that a \$5000 monthly retainer expected from a particular client did not materialize.
4. Gurvey asked to stay on at Cowan through September and was allowed to do so. Her last payment from Cowan covered the two week period ending August 15, 2002.
5. The Agreement, largely drafted by Cowan and based on its standard contract of this kind, did not provide for termination for cause and did not condition payment of the "base compensation" on any performance standards regarding billable hours or "Billing Units" defined in the

Agreement. Although the Agreement stated that the parties could conduct a fairness review of the base compensation at any time, no such review was requested or conducted.

6. Gurvey's proofs established that Cowan breached the Agreement by failing to pay the balance of her salary due from August 15 through December 31, 2002 at the rate of \$150,00 per year, which totals \$60,250. Although Gurvey also requested "the value of four weeks vacation time," the Arbitrator finds that no additional sum would be owing to Gurvey on account of vacation. The Agreement states that she was entitled to "the same vacation rights as other counsel (currently 4 weeks per calendar year with no carryover from year to year)." Thus, the value of Gurvey's vacation rights are included within her unpaid salary.

7. Cowan raised several defenses to the breach of Agreement claim: that Gurvey failed to perform; breached the implied covenant of good faith and fair dealing; and was a "faithless servant". After consideration of the proof on these issues, the Arbitrator concludes that there was insufficient evidence of Gurvey's nonperformance--which would have had to be tantamount to "lack of consideration" given the terms of the Agreement: no right to terminate for cause and no performance or billing standards. The other arguments did not fit the facts presented.

8. Cowan's counterclaim is denied. Respondent failed to carry its heavy burden of proof on a fraud claim, particularly with respect to the elements of materiality and reasonable reliance. Further, many of the alleged misrepresentations or omissions were facts and circumstances that Cowan only learned about long after its determination to terminate Gurvey.

9. Each party shall bear its own legal fees, costs, and expenses of this Arbitration as well as one half of the fees of the Arbitrator.

10. Gurvey further requested interest "at the statutory rate since August 12, 2002." The Arbitrator declines to award interest for that period of time for these reasons: the Agreement does not provide for the payment of interest; interest was not sought in Gurvey's demand for arbitration, and the Arbitration Rules for Disputes Among Lawyers of The New York City Bar Association provide discretion to the Arbitrator. Gurvey did not commence this proceeding until approximately six years after her termination. She should not profit by this delay. Consequently, the Arbitrator has determined that Gurvey is entitled to interest on \$60,250 (but not interest on interest) at the statutory rate from April 16, 2008 to the date of the Award.

In summary, I AWARD as follows:

1. Respondent shall pay Claimant the sum of \$60,250.00 on Claimant's breach of Agreement claim (the "Award").
2. The only pre-judgment interest that Claimant shall recover is interest at the statutory rate commencing April 16, 2008 up to but not including the date of this Award, on the amount of the Award, but not interest on interest.
3. Post-award interest shall accrue from the date of this Award until paid in full at the statutory rate.
4. Administrative fees of The Association of the Bar of the City of New York, attorney's fees, and any costs and expenses shall be borne by each party to the extent incurred.
5. Each party shall pay one-half of the fees of the Arbitrator.

6. Respondent's counterclaim is denied.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims or counterclaims not expressly granted herein are hereby denied. The Arbitrator will maintain jurisdiction.

August 4, 2009
Date

Charlotte Moses Fischman
Charlotte Moses Fischman

I, Charlotte Moses Fischman, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

8/4/2009
Date

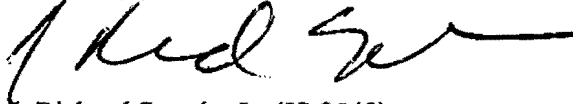
Charlotte Moses Fischman
Charlotte Moses Fischman

Hon. Lorna G. Schofield
November 12, 2014
Page 3

9. Plaintiff's Motion to Judge Schofield for Reconsideration of Orders Denying Interlocutory Appeal and Remand. Docket No. 277.

In addition, Plaintiff yesterday noticed a motion to disqualify Magistrate Judge Pitman for alleged bias against her.

Very truly yours,



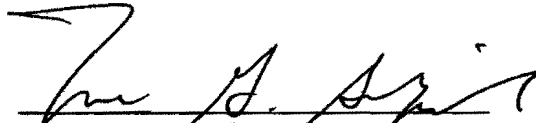
J. Richard Supple, Jr. (JS 3549)

cc: Amy Gurvey (by overnight mail)

APPLICATION DENIED without prejudice to renewal upon disposition of Plaintiff's pending Motion to File a Sixth Amended Complaint. The Clerk of Court is directed to send a copy of this Order to the pro se Plaintiff.

Dated: November 17, 2014

New York, New York



LORNA G. SCHOFIELD

UNITED STATES DISTRICT JUDGE

HINSHAW

& CULBERTSON LLP

ATTORNEYS AT LAW

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13th Floor
New York, NY 10022

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Richard Supple
212-471-6210
rsupple@hinshawlaw.com

November 12, 2014

BY ECF

Hon. Lorna G. Schofield
United States District Judge
United States District Court
Southern District of New York
40 Centre Street
New York, New York 10007

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 11/17/2014

Re: *Gurvey v. Cowan Liebowitz & Latman, P.C. et al.*
No. 06 Civ. 1202 (LGS)(HBP)
Request for a Pre-Motion Conference

Dear Judge Schofield:

This firm represents the defendants, who wish to make a summary judgment motion. Accordingly, I write to request that the Court schedule a pre-motion conference. I am available to attend a conference any day convenient to the Court during the week of December 1, 2014. By order of Magistrate Judge Pitman, dispositive motions in this case are to be filed by January 23, 2015.

Issue(s) in Dispute

As the Court is aware from the many motions previously filed in this case, plaintiff is a suspended attorney and frequently-sanctioned litigant who worked briefly as an "of counsel" attorney at defendant Cowan Liebowitz & Latman P.C. ("Cowan") in 2002 before her employment was terminated. Shortly after her employment began, plaintiff asked Cowan, which concentrates in intellectual property matters, to prepare a preliminary patent application for a process she allegedly conceived to distribute recordings of live performances. She alleges in this lawsuit that defendants breached their fiduciary duty to her and committed legal malpractice by improperly transmitting her confidential information to third parties, including dismissed defendant Clear Channel Communications, Inc. (Numerous other claims by plaintiff were dismissed by this Court pursuant to Fed.R.Civ.P. 12(b)(6) in April 2009. *See* Docket No. 66; Docket No. 91 [Second Circuit Mandate].) Defendants have unreservedly denied all of plaintiff's pending claims.

Building on the Barger Tradition

Hon. Lorna G. Schofield
November 12, 2014
Page 2

Basis of Summary Judgment Motion

Summary judgment is warranted for three principal reasons.

First, plaintiff's lawsuit was filed after the applicable three-year limitations period expired. As of June 2002, plaintiff admitted that Cowan would no longer perform any services relating to her invention. As of December 2002, she was threatening to sue defendants. This lawsuit was not filed until February 2006, more than three years after any reasonable reliance by plaintiff upon defendants had ended.

Second, plaintiff admitted at her recent deposition that she has no direct evidence to support her claims against any defendant. Indeed, plaintiff indicated that she sued at least some individual defendants wholly out of personal animus. Nor is there any circumstantial evidence that credibly supports her claims. Plaintiff took no depositions of any witness before the discovery cut-off date (September 19, 2014).

Third, the recording distribution program used by Clear Channel does not, in fact, use or employ any of plaintiff's supposed confidential information. Accordingly, plaintiff cannot prove that a third party misused her confidential information.

Additional Information

The Court should be aware that there are several motions currently pending before Magistrate Judge Pitman, and one motion pending before Your Honor. They are as follows:

1. Defendants' application to fix the amount of plaintiff's Rule 37 sanction. Docket No. 205.
2. Plaintiff's Motion to File Sixth Amended Complaint. Docket No. 207.
3. Defendants' Motion for Rule 11 Sanctions. Docket No. 223.
4. Defendants' Motion for Rule 11 Sanctions. Docket No. 224.
5. Plaintiff's Motion to Disqualify Counsel. Docket No. 233.
6. Defendants' Cross-Motion for a Filing Injunction. Docket No. 248.
7. Plaintiff's Motion to Compel Discovery and for Rule 37 Sanctions. Docket No. 270.
8. Defendants' Cross-Motion for Rule 37 Sanctions. Docket No. 272.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 14-960-cv;15-285-cv

Caption [use short title]

Motion for: Stay of appeal(s) pending adjudication of Gurvey v. Cowan Liebowitz & Latman PC

Plaintiff's 6AC, motion to compel discovery (both sub judice for 24 months) and application of Rule 1927 sanctions

Set forth below precise, complete statement of relief sought:

See above

MOVING PARTY:

☒ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY:

Cowan Liebowitz & Latman and managing partners and attorneys

MOVING ATTORNEY: Plaintiff USPTO Inventor pro se

OPPOSING ATTORNEY: Richard Supple, Esq.

[name of attorney, with firm, address, phone number and e-mail]

Amy R. Gurvey

Hinshaw & Culbertson, LLP

315 Highland Avenue

800 Third Avenue 13th FL

Upper Montclair, NJ 07043

New York, NY 10022

Court-Judge/Agency appealed from: SDNY Hon(s) Lorna G. Schofield; Magistrate Henry B. Pitman

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☒ Yes ☐ No (explain):

Opposing counsel's position on motion:

☐ Unopposed ☐ Opposed ☒ Don't Know

Does opposing counsel intend to file a response:

☐ Yes ☐ No ☒ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?

☐ Yes ☐ No

Has this relief been previously sought in this Court?

☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested?

☒ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?

☐ Yes ☒ No If yes, enter date:

Signature of Moving Attorney:

Date: Feb 25 2015

Service by: ☒ CM/ECF

☐ Other [Attach proof of service]

315 Highland Avenue
Upper Montclair, NJ 07043
Cellular 917-733-9981
amyweissbrod@verizon.net
February 25, 2015

Yadira Vargas Case Manager
United States Court of Appeals for the Second Circuit
40 Foley Square
Clerk's Office Room 150
New York, NY 10007

cc: Hon. Lorna Schofield, SDNY
Hon. Magistrate Henry B. Pitman SDNY

Re: Curvey pro se v. Cowan Liebowitz & Latman, PC Case #s14-960-cv; 15-285-cv
2d Cir. Status Update; Motion for Stay of Appeal Pending Adjudication of Plaintiff's
6AC, motion to compel Cowan's outstanding discovery and Rule 1927 sanctions

To The Honorable Court:

This is Plaintiff pro se Amy Curvey's 30-day status update ordered by Second Circuit to which is appended Plaintiff's motion for a stay of the above appeal(s) pending adjudication by the District Court, *inter alia*, of Plaintiff's 6AC, motion to compel outstanding documents including non-public patent files from Cowan defendants (both still sub judice before Magistrate Pitman after 24 months); and motion for Rule 1927 sanctions against Cowan defendants and their attorney, Richard Supple, Esq. ¹ The law is unanimous that Cowan's fiduciary duty to Plaintiff as her patent attorneys is paramount to any issue of its own defense; and that relevant documents, electronic documents and non-public patent documents must be compelled. Cold Spring Harbor Laboratories v. Ropes & Gray, 2011 WL 2884893(D. Mass.); 840 F. Supp. 2d 473 (2012)

¹ Plaintiff contends that Supple as agent for Cowan defendants frivolously continued this lawsuit without merit for 9 years, submitted unilaterally altered patent evidence to the District Court with changes self-serving to Cowan defendants, and abused litigation privilege by disseminating false and privileged communications to outside attorneys and judges unrelated to the case to prevent Plaintiff from retaining an attorney and to recover her non-public patent files. Supple's firm and its partners have already been held personal liable to opposing attorneys for abusing litigation privilege in other complex cases. Edelman Combs & Latturner v. Hinshaw & Culbertson, LLP, 338 Ill. App. 3d 156, 798 NE 2d 740 (2003); US Express Lines v. Higgins, 281 F. 3d 383 (3d Cir. 2002); Antonelli v. Westville Holdings. 2012 WL 280722 (Bkrtcy DNJ 2012).

In 2012, this Court reversed sua sponte dismissal of Cowan defendants after a three-year appeal². But now three years after remand, Plaintiff still has virtually zero responsive discovery or her non-public patent files outstanding since 2006, based on Magistrate's continuing failure to adjudicate Plaintiff's motions. Magistrate has also not adjudicated Plaintiff's applications for signed subpoenas to get all her non-public patent files from subsequent NY patent attorneys retained post Cowan to mitigate damages³; or to compel return of Plaintiff's case files from her previous attorneys herein, Squitieri & Fearon, LLP. Plaintiff had to enter Supreme NY in 2012 to get her case files from Squitieri by writ of replevin to continue pro se prosecution of this lawsuit. The writ was granted in April, 2013. (Supreme NY Index No. 12/102516), at which time, Plaintiff got the limited discovery Cowan and Supple produced for 2009 Arbitration, that Plaintiff won on all counts in August, 2009. The Award of Arbitrator was inconsistent with Judge Jones' previous order granting sua sponte dismissal and closing the case in April, 2009.

In 2014, the USPTO General Counsel noticed Plaintiff that Cowan defendants are under ongoing investigation for potentially criminal misconduct in connection with Plaintiff's patent retainer. USPTO confirmed an ongoing OED investigation based on Cowan defendants' integrating Plaintiff's inventions and ideas into another client's patent application on May 6, 2002 (Legend Films of San Diego) and purging the relevant files from Plaintiff's edirectories "at the client's instructions".

Cowan defendants' acts of allowing Legend Films officers to induce breach of fiduciary duty to Plaintiff (who was the earlier patent client on competing technologies) and to allow Legend officers to get patent claims on Plaintiff's confidential digital conversion technologies, are separate from Cowan defendants' other acts of patent malpractice, breach of attorney client privilege and disseminating Plaintiff's inventions and ideas in premium ticketing, paperless ticketing and digital conversion, editing and authenticated content distribution technologies to clients Clear Channel, Live Nation, Phish and MLB (owner of Tickets.com). Plaintiff's digital conversion and editing technologies are common to both systems. They are part of a complete portfolio in event content conversion and authenticated digital distribution with apparatuses given to Cowan defendants to protect in December, 2001 and pursuant to which Cowan took a \$50,000 retainer from Plaintiff. Cowan defendants withheld services under Plaintiff's retainer and did patent work for other clients first after getting complete access to Plaintiff's inventions, in essence to unduly delay Plaintiff's ability to get her patents at the earliest possible time and to enforce her patents against other clients. Cowan then converted Plaintiff's patent retainer and did no work worth more than \$1,500 before moving to unilaterally withdraw a year later for an admitted conflict of interest, the source and nature of which was never disclosed.

USPTO General Counsel also noticed that Plaintiff's remedies to get her non-public patent files is from the court adjudicating Plaintiff's damage claims and not by FOIA requests to

² 462 Fed. Appx. 26 (Feb. 10, 2012)

³ Plaintiff's motions for signed subpoenas have been ripped out of the SDNY file room.

the USPTO. However, all Plaintiff's document requests directed to Magistrate have not been adjudicated.

Cowan's separate misconduct as to Legend Films was first discovered close to a year after remand and more than 7 years before the District Court. The discovered emails established Cowan's actual integration of Plaintiff's inventions and confidential business ideas protected by attorney client privilege into Legend's PCT patent application on May 6, 2002.⁴ Plaintiff's ideas included making a restored black-and-white negative a by-product of the digital colorization process disclosed by Legend's COO and to claim ancillary uses for animation. When colorized films were not successful, Legend used Plaintiff's ideas to enter a whole separate business of restoring old Hollywood films and series. Plaintiff was never paid because Cowan, that was party to an unlawful agreement with Legend, prevented notice to Plaintiff by purging the files 'at Legend's instructions'.

Pursuant to the unlawful agreement, Cowan defendants also omitted Plaintiff's name as co-inventor on Legend's PCT in violation of 37 CFR 1.48(a). Cowan also fraudulently denied to Plaintiff's face on May 7, 2002 that any patent work had yet been done for Legend, when 4 months when four months of stellar technical work had been performed, demonstrating fraud and complicity.

The facts are now undisputed that in 2002 Cowan defendants intentionally concealed from Plaintiff known conflicts of interest with Plaintiff's inventions and all patent work for Legend, and worked for Legend without a retainer agreement (that would have to have been approved by Plaintiff who was the existing general counsel. These acts coupled with Cowan's intentional withholding of patent services under Plaintiff's retainer until after Legend's PCT was filed, allowed Legend to get issued patent claims in the US and Europe on Plaintiff's inventions and ideas ahead of Plaintiff. Plaintiff's damages therefrom as stated in the 6AC are 11 years of patent royalties, services retainers and customization contracts during Legend's digital international monopoly for restoration of older black and white Hollywood films and series. Legend original colorization business failed miserably, and it was Plaintiff's ideas for restoration that ultimately made Legend more than \$60mil in the international market. An amended complaint must be allowed Plaintiff under the liberal pleading rules of this Court. Williams v. Citibank, 659 F. 3d 208 (2d Cir. 2011); and relevant statutes of limitation are tolled from

⁴ Legend's provisional patent application filed in May 2001 (USPTO Appl No. 60/288929 not published) disclosed only one digital film colorization process. Its COO's previous application was analog only and a work for hire for his former employer. Plaintiff digital conversion algorithms for the editing and conversion of event copyrighted content were integrated to update the previous analog applications. Cowan also inserted Plaintiff's business ideas.

Cowan's purging. Micron Technology v. Rambus, 645 F. 3d 1311 (D. Del. 2013); Protostorm v. Antonelli, 834 F. Supp. 141 (EDNY 2012)

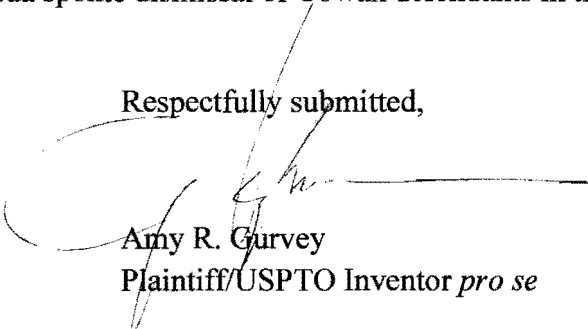
Cowan defendants also *admitted* to a conflict of interest on a USPTO form attempting unilateral withdrawal from Plaintiff's representation in 2003. On this form, Cowan also inserted nonexistent attorney customer numbers and a non-existent address in Washington, DC, demonstrating further intent to conceal and defraud. The withdrawal form was also not served upon Plaintiff and there is no proof of service at the USPTO. USPTO Commissioner, Wynn Coggins, then noticed that no action could be taken on Plaintiff's patent applications until the issue of Cowan's improper withdrawal was resolved. This demonstrates further prejudice caused by Cowan's patent malpractice.

In July, 2014, USPTO General Counsel also noticed that Plaintiff's discovery rights against Cowan are before tribunals adjudicating Plaintiff's damage claims and not from the USPTO through FOIA, 5 USC §552.

In October, 2014, Judge Lorna Schofield ordered that Plaintiff's 6AC must be adjudicated by Magistrate before any dispositive motions can be filed.

In spite of Judge Schofield's October, 2014 order, no adjudication of Plaintiff's 6AC has yet been forthcoming from Magistrate. Magistrate Pitman is thereby contended to be defying Second Circuit order that reversed sua sponte dismissal of Cowan defendants in the first half of the case.

Respectfully submitted,



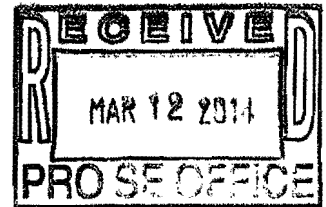
Amy R. Curvey
Plaintiff/USPTO Inventor *pro se*

2d Cir. ECF

Richard Supple, Esq. Hinshaw & Culbertson, LLP

ORIGINAL
COURT COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



AMY R. GURVEY,

Plaintiff-Inventor *Pro se*,

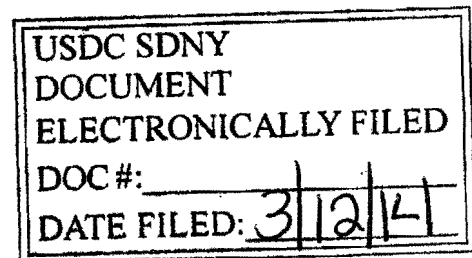
Case No. 06 Civ. 1202
(LGS)(HBP)

v.

COWAN, LIEBOWITZ & LATMAN,
PC, WILLIAM BORCHARD, MIDGE
HYMAN, CHRISTOPHER JENSEN,
SIMON GERSON, R. LEWIS
GABLE, MARK MONTAGUE, AND
BAILA CELEDONIA, ET AL.,
(Collectively "Cowan defendants").

**PLAINTIFF PRO SE'S
NOTICE OF MOTION TO
FILE AND SERVE A SIXTH
AMENDED COMPLAINT
("6AC") BASED ON COWAN
DEFENDANTS' FIRST
DOCUMENT PRODUCTION**

Defendants.



PLEASE TAKE NOTICE that on the 19th day of March, 2014 at 9:30 a.m. in the forenoon of that day or as soon thereafter as the parties may be heard, Plaintiff *pro se* Amy R. Weissbrod Gurvey, a USPTO inventor, will move this Court for an order authorizing filing and service of Plaintiff's proposed Sixth Amended Complaint ("6AC") attached hereto under FRCP Rule 15 (c) and seeking a stay of Plaintiff's motion to remand the instant lawsuit to the Supreme Court of NY, NY County pending adjudication of the instant motion for leave to amend and any appeal thereon, on grounds that:

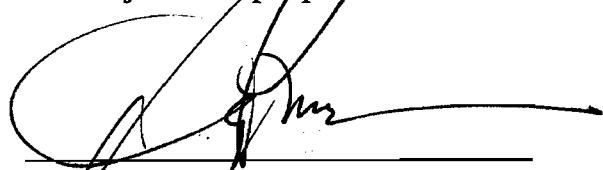
- (1) Amended complaints are encouraged and the federal laws are liberally construed in favor of the Plaintiff's right to amend especially when defendants' first discovery supports an amended pleading;
- (2) Plaintiff's proposed 5AC denied by the District Magistrate in 2013 was filed in September, 2012 prior to Cowan defendants' first document production in December, 2012 after almost seven years; and an amended complaint is warranted by defendants' discovery;
- (3) Magistrate's July 2013 order ordering that Cowan answer the 2007 3AC filed by Plaintiff's previous attorneys Squitieri & Fearon, LLP ("S&F") and denying reconsideration was based on the fact that the new evidence warranting Plaintiff's 6AC amended complaint was not previously before the Court when the 5AC was filed; Plaintiff is therefore entitled to adjudicate new evidence discovered after the 5AC was filed.
- (4) Cowan defendants' first document production established that defendants improperly concealed an irreconcilable conflict of interest with at least two other clients Legend Films, LLC/Legend Films, Inc., and its COO, Barry Sandrew that arose in 2002; and that patent work was done for Sandrew and a PCT filed by Cowan defendants integrated Plaintiff's inventions and ideas, such that Cowan was required under 37 CFR §1.48 to list Plaintiff as a co-inventor; and its failure to do so could not be remedied and caused Plaintiff significant additional damages;
- (5) Cowan defendants thereafter in 2003 admitted to a conflict of interest in a USPTO patent form filed by Cowan seeking to withdraw from Plaintiff's USPTO representation but the source and nature was never disclosed;
- (6) Cowan defendants' first document production established that Cowan defendants inserted certain of Plaintiff's inventions, ideas and trade secrets Cowan defendants had already agreed to protect for Plaintiff into a concealed and unpublished PCT patent application filed for Sandrew on May 6, 2002, assigned the PCT to Legend Films, LLC the same day, and then purged the relevant files from Plaintiff's e-directories "at the client's instructions";

- (7) Cowan defendants then unilaterally altered Plaintiff's purged files causing unilateral alteration of evidence relevant to Plaintiff's claims in this lawsuit. Micron Technology v. Rambus, 645 F. 3d 1311 (D. Del. 2013);
- (8) Cowan defendants committed fraud by falsely denied to Plaintiff's face on May 7, 2002 that patent work had not yet been done for Legend and its officers because no retained was yet signed and no retainer monies received;
- (9) Plaintiff's proposed 6AC alleges that Cowan defendants, as Legend and Sandrew's attorney/agent, violated 37 CFR §1.48, demonstrating that subject matter jurisdiction over the 6AC is pursuant to violation of an Act of Congress and therefore falls within 28 USC §§ 1331 1338; all other claims including those upheld by the Second Circuit in Plaintiff's favor in February, 2012 are state claims;
- (10) If the Court denies Plaintiff's 6AC then in fact Plaintiff's remaining claims for patent malpractice and breach of fiduciary duty per the 3AC upheld by the Second Circuit are not within the exclusive jurisdiction of the federal courts. Gunn v. Minton, 133 S. Ct. 1059 (USSC Tex. 2013) (Roberts J.)
- (11) Magistrate's July 2013 orders are inconsistent with Cowan's document production that proves that Plaintiff's claims against Sandrew and Legend Films are inextricably related to Plaintiff's claims herein because a conspiracy between Cowan defendants and Legend's officers existed and Cowan defendants aided and abetted the theft of Plaintiff's inventions, ideas and trade secrets by performing several acts in furtherance of the conspiracy including omitting Plaintiff's name as co-inventor of Sandrew's concealed PCT filing, and purging and withholding the relevant files from Plaintiff's files and e-directories "at the client's instructions";
- (12) The newly-discovered evidence that Cowan defendants engaged in fraud, purging of files and submitted doctored evidence to this Court demonstrates Cowan defendants and its attorney's engaging

in frivolous litigation to defraud the Court and unduly prejudice and injure Plaintiff's interests in this lawsuit;

- (13) Plaintiff has lost 11 years of patent royalties, customization contract and service retainers as a result including rights to participate in Legend's corporate profits demonstrating significant newly found damages over the previous 3AC;
- (14) Based on Cowan defendants' heinous misconduct and bad faith and continuing to withhold fees and costs awarded by the Second Circuit, Plaintiff is entitled to attorneys' fees and costs to bring this motion, to continue prosecution of languished patent applications in the US and Europe, to file any further appeals, and such other and further relief as the Court deems just and proper.

Dated: March 9, 2014
Montclair, NJ 07043



AMY WEISSBROD GURVEY
PLAINTIFF PRO SE
315 HIGHLAND AVENUE
UPPER MONTCLAIR, NJ 07043
PH 917-733-9981
ECF amyweissbrod@verizon.net

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY R. GURVEY,

Plaintiff-Inventor *Pro se*,

v.

COWAN, LIEBOWITZ & LATMAN,
PC, WILLIAM BORCHARD, MIDGE
HYMAN, CHRISTOPHER JENSEN,
SIMON GERSON, R. LEWIS
GABLE, MARK MONTAGUE, AND
BAILA CELEDONIA, ET AL.,
(Collectively "Cowan defendants").

Defendants.

Case No. 06 Civ. 1202
(LGS)(HBP)

**PLAINTIFF'S PROPOSED
SIXTH AMENDED
COMPLAINT ("6AC")
BASED ON COWAN'S FIRST
DOCUMENT PRODUCTION**

JURY TRIAL REQUESTED

I. STATEMENT OF THE CASE

1. Plaintiff pro se Amy R. Gurvey is the exclusive inventor of two (2) US patents issued by the United States Patent and Trademark Office ("USPTO")¹ and sixteen (16) patent applications still pending at the USPTO and European Patent Office ("EPO"). Plaintiff is President and Founder of an early-stage interactive production and technology studio, LIVE-FI™ Technologies, LLC, parent of production subsidiary LIVE-FI™

¹ Gurvey US Patent Nos. 7, 603, 321 and D610947S issued on October 13, 2009 and November 1, 2011

Entertainment, with both companies raising venture capital based on Plaintiff's issued patents, proprietary technology, and original, interactive television shows that are managed and administered by her patented platforms and interactive user applications.

2. Plaintiff two (2) US patents and one EPO disclosure (still in active prosecution) and several of the pending US patents in Plaintiff's portfolio are based on Plaintiff's long-form patent drafts, schematics, drawings, specifications, utility disclosures, schematics and apparatus hardware designs that were given to Cowan defendants to protect in January, 2002 pursuant to retainer in December, 2001.

3. The unprecedented and expensive time delay of 8-12 years in patent prosecution before two patent tribunals was caused by Cowan defendant's patent malpractice, breach of fiduciary, fraud, and breach of Plaintiff's attorney client privileges and intentional and/or reckless withholding of essential patent services for Plaintiff at critical early stages for more than six months. For example, Cowan defendants never advised Plaintiff of her rights to US expedited prosecution within 24 months and non-publication that were waived for Plaintiff by Cowan defendants when not exercised with the first applications. Cowan defendants should have but did not file to exercise such rights for Plaintiff in January, 2002 to maximally protect her inventions and priority dates.

4. In addition, the issuance to Plaintiff of less than maximum claims after close to 8 years, allowed certain Cowan clients and others significant lead time to outsource Plaintiff's inventions or applications thereof, and also to copy or outsource Plaintiff's disclosures that were published. None of the unauthorized users since 2003 could be aborted or royalties collected without issued patent claims in spite of Plaintiff's attempts.

5. In this lawsuit based on Cowan defendants first document production in December, 2012 after 7 ½ years, it is now established that Cowan was party to a 2002-3 conspiracy to aid and abet theft and conversion

of Plaintiff's inventions to benefit itself and at least one other client, Barry Sandrew, CTO of Legend Films. The Legend matter is the quintessential example of Cowan defendants' fraud, bad faith and intentional torts and explains how Plaintiff was so severely damaged. Cowan defendants were induced to breach fiduciary duties to Plaintiff by Sandrew, Legend and upon belief, also by other clients.

6. As to Sandrew and Legend, on May 6, 2002 Cowan defendants – without a patent retainer as required under NY statutes – filed a secret formal PCT patent application knowingly integrating Plaintiff's inventions. Cowan was already obligated by retainer to protect without crediting Plaintiff as co-inventor in violation of 37 CFR §1.48. Cowan defendants then denied to Plaintiff's face that any such work had been done; and then withheld/purged the relevant files from Plaintiff's e-directories "at its client's instructions". A violation of 37 CFR §1.48 cannot be remedied; and lost Plaintiff 10 years of her right to participate as a co-inventor in Legend's patent services retainers, royalties, customization contracts and overall corporate profits.

7. That Cowan defendants purged the relevant files from Plaintiff's e-directories in 2002-3 was intentionally done to impede Plaintiff's earlier discovery of the scope of her fraud and conspiracy claims that are now established to also include aiding and abetting patent theft before the USPTO and PCT, converting confidential information acquired to an attorney client relationship with Plaintiff to benefit themselves and other clients. That Plaintiff is entitled to prove such claims is the holding of the Second Circuit. [462 Fed. Appx. 26 (2d Cir. February 10, 2012)].

8. Cowan's continued withholding and purging of files also allowed the new District Magistrate to somehow find that Plaintiff's claims against Cowan defendants and Legend officers were not related when defendants were actual parties to a grand conspiracy to steal Plaintiff's inventions.

9. The conspiracy has now been established from Cowan's first document production in December, 2012 and that Cowan defendants and their

attorney also doctored some of the purged files and over the last eight years before this Court including for the March, 2009 arbitration, filed self-serving altered photocopies in support of frivolous motions; and in further violation of the attorney-client privilege, also sent the forgeries to Sandrew and Legend's attorneys in California to prejudice Plaintiff's claims in the parallel lawsuit. Because of Cowan's file purging, Plaintiff did not know that she had such extensive tort claims for conspiracy and patent theft.

10. Had Cowan defendants performed according to the standard of care for patent attorneys, however, Plaintiff would have had her first issued US patent claims in 2004-5 instead of on October 13, 2009, which would have avoided this lawsuit altogether and/or markedly changed its outcome. Plaintiff would have had an earlier right to enforce her intellectual assets against infringers, unauthorized users, and as to Legend, thieves.

11. For example, former corporate defendants Clear Channel and Live Nation, were dismissed in March, 2009 based on false jurisdiction papers that their newly formed subsidiaries Instant Live Concerts LLC and Next Ticketing, Inc. had no sufficient NY contacts to acquire jurisdiction over the parents. The order entered in spite of defendants' false jurisdictional papers in the face of concrete public files that Clear Channel and Live Nation own and operate 145 concert and event venues in NYS alone; and that this Court has conferred personal jurisdiction over these defendants in several other cases.

12. However, these defendants' infringement of Plaintiff's issued patents conferred separate mandatory jurisdiction over defendants as unauthorized users. Ergo, had earlier patent claims issued to Plaintiff which did not occur only because of "but for" misconduct by Cowan defendants, Plaintiff could have recovered infringement damages by 2006 and aborted the unauthorized uses by Clear Channel, Live Nation, Phish, and new subsidiaries Instant Live Concerts, LLC, and Next Ticketing, Inc., all in the instant lawsuit. Furthermore, the District Court's improper reference to Plaintiff's patents at "business plans" some 8 times in its April 27, 2009 order

closing the case [2009 WL 609156] could never have issued because business plans don't qualify for patents [35 USC §§101, et seq.].

13. The Patent Laws as interpreted by the US Federal Courts require notice of "actual injury" to patents such as lost or forfeited patent claims to start the statute of limitations running on patent malpractice and misconduct causes of action caused by the attorney. As to Plaintiff, actual injury occurred on October 13, 2009 when Plaintiff was issued her first US patent and claims after persevering before the USPTO and discovered that claims owing were missing. Protostorm v. Antonelli, Terry, Stout, et al., 834 F. Supp. 2d 141 (EDNY 2011). That Cowan defendants had the disclosures since January 2002 enabling expanded claims and then purged relevant files and tampered with evidence to deny Plaintiff notice of her the scope of her claims, demonstrates a grander fraud and bad scheme and tolls all prevailing statutes. Micron Technology v. Rambus, 645 F. 3d 1311 (D. Del. 2012)

14. Moreover, because recovery of infringement damages are within the exclusive jurisdiction of the federal courts and require resolution of a substantial issue of federal patent law [28 USC §§1331, 1338], all damages pertaining to Plaintiff's lost royalties emanating from Cowan's malpractice and breach of fiduciary duty as upheld by the Second Circuit would have to have been adjudicated by this Federal Court, with Cowan defendants secondarily liable as its clients' agent for enabling either their clients' unauthorized uses or alternatively, for not properly protecting Plaintiff's inventions and rights of enforcement. Gunn v. Minton, 133 S. Ct 1059 (USSC Tex. 2013). In the interests of justice and judicial economy that would have been the best possible resolution of this lawsuit. Plaintiff would have recovered one satisfaction leaving Cowan and its clients to adjudicate contribution.

15. However, this case is significantly more serious and complicated because of a grander fraud and conspiracy scheme involving Cowan defendants and Legend's officers. Micron Technology v. Rambus, 645 F. 3d 1311 (D. Del 2012). Plaintiff was intentionally denied notice of the fraud and conspiracy to commit patent theft causes of action. Plaintiff's complete rights

of patent enforcement and misconduct damage recovery therefore, are far more extensive, have been thwarted, severely prejudiced, and remain at bay.

16. This Court, therefore, cannot assume – even with issued patent claims - that Plaintiff now has adequate rights of enforcement against Cowan defendants, its clients, Legend officers and others. Contract claims in the Legend lawsuit were dismissed by the SDCA with Plaintiff also being denied discovery after Cowan defendants got documents to Legend and its attorneys in breach of Plaintiff's attorney client privilege. And some of the patent claims that Plaintiff was entitled to have issued may never issue based on Cowan's heinous misconduct and bad faith..

17. That Plaintiff got issued US patent claims, however, does mean that her inventions were novel, useful and patentable, and that "but for" analysis required for patent malpractice, breach of contract and breach of fiduciary against Cowan defendants does exist.

18. Plaintiff's recoverable damages emanating directly from Cowan's heinous reckless torts are lost patent royalties, customization contracts and retainers over the last 10 years, all that relate back to each client's dates of unauthorized use(s). In addition, as discovered from the December 2012 document production, Plaintiff is entitled to recover damages for Cowan's conspiring role in causing forfeiture of significant participations in Legend Films' royalties, customization contracts for black-and-white film colorization and lost corporate profits since 2003.²

² There is a grander fraud scheme evolving from this lawsuit also recoverable against Cowan defendants based on Plaintiff's former attorney, Squitieri & Fearon (S&F)'s withdrawal without cause as soon as Plaintiff's first patents issued, and S&F's failure to consolidate the instant lawsuit with the SDNY lawsuit filed against Legend Films in 2008, 08-cv-9256 (SHS)(SDNY). Instead of moving to consolidate with the instant suit as Plaintiff instructed, S&F moved on stipulation without Plaintiff's consent to transfer the Legend matter then pertaining to contract issues to California. Had Cowan defendants not purged the relevant files of the known conspiracy between Cowan and Sandrew to commit patent theft before the USPTO and steal Plaintiff's technologies, of course, S&F would not have transferred the contract matter; and based on earlier discovery, this case might long be over.

II. LITIGATION HISTORY

19. The two grossly substandard provisional US patent synopses filed by Cowan defendants on May 22 and 24, 2002 as Plaintiff's first exclusive attorneys (US Patent Application Nos. 60/382,710;60/382,949) did not include Plaintiff's draft specifications, drawings and schematics that Cowan defendants should have edited and filed immediately to protect Plaintiff's priority dates. Cowan defendants, upon belief, had don't know work for Plaintiff whatsoever after accepting a substantial retainer and bargaining for an option to invest in Plaintiff's patents in 2001 during negotiations with headhunter Audrey Golden & Associates.

20. Cowan defendants knowing the empirical value of priority dates to an inventor, in fact, lost some of Plaintiff's valuable priority dates because the first formal US application has still not issued and Plaintiff first issued claims emanated from a continuation in part of that application filed in 2004 filed by another firm that was almost identical to the earlier application and Plaintiff's formal draft that Cowan had since January, 2002 and ordered Plaintiff to disclose to its partners in February, 2002.

21 Cowan defendants also improperly gave themselves additional conflicts by bargaining to invest in Plaintiff's patents and within a few weeks, breaching the attorney client privilege by failing to keep Plaintiff's inventions confidential. Upon belief, Cowan defendants learned within one month that other clients had interest in the subject matter. Plaintiff, as a result, did not get the stellar services performed for Legend Films and its officers.

22. On April 17, 2002, Cowan signed and date-stamped a contract rider agreeing that Plaintiff was reserving all her right title and interest in and to her inventions, and in an to 3% vested in Legend stock at founders' level

that Cowan defendants knew was her compensation for business and technology consulting services to the founders including Sandrew since 1999.

23. In addition, Cowan defendants who are supposed experts in IP law, further prejudiced Plaintiff's inventions by not performing patent searches and qualifying the prior art for USPTO examiners in Plaintiff's applications. During the first six months, two other *primary* mobile ticketing patent applications had been filed in the US and Japan; and Cowan failed to discover this information.

24. Cowan defendants also breached their duty of absolute confidentiality and loyalty to Plaintiff as noted by the Second Circuit.

25. In February, 2002 Cowan managing defendant William Borchard forced Plaintiff to present her inventions at a firm's monthly partner's meeting and Plaintiff, as ordered, gave a 1 ½ hour presentation after which she got a standing ovation from the entire defendant law firm. Defendant Borchard told Plaintiff her inventions created "quite a buzz".

26. Immediately after that meeting, Cowan defendants - without Plaintiff's authorization or consent - started disseminating notes and notices referring to Plaintiff's inventions as a "*Cowan patent project*". However, defendants still did nothing to protect Plaintiff's inventions. Cowan attorney Susan Schick e-mailed partners that she wanted to work on the project team and then upon belief, Schick re-disseminated Plaintiff's confidential information to her finance, Michael Gordon, bass guitarist of Phish (now Schick's husband). Gordon knew all about Plaintiff's inventions by the time Cowan hosted a firm party in April 2002, demonstrating that there was a serious leak that Cowan defendants had caused. ³

³ Gordon and Schick who were added as individual defendants by S&F in the 3AC filed in 2008, were never timely served by S&F.

27. Plaintiff's discovery demands served upon Cowan defendants remain virtually unanswered even in the two years post remand from the Second Circuit.

28. Plaintiff properly seeks documentary confirmation of all hard and electronic files corroborating Cowan's work, notes, memoranda and communications pertaining to Plaintiff's inventions, all internal and external communications referring "Cowan patent project", all Cowan's USPTO and PCT filings and papers of all kind and character, all OEM and disciplinary communications, and all documents from Sandrew's and Legend's representation. Plaintiff's complete USPTO files during Cowan's retainer are the subject of an FOIA request, being processed.

29. Upon best belief, however, Cowan defendants performed no services before May 22, 2002 and hardly any services after that date for the full period of retainer that endured per USPTO dockets at least until September, 2003. Plaintiff is told there are at least two dockets for each of Cowan's filings plus additional documents with the Commissioner's office that are not on the application sites.

30. Based on what has been produced so far, however, it is clear that Cowan defendants did virtually no work commensurate with the retainer and converted Plaintiff's funds.

31. For the 22 months that Cowan defendants were Plaintiff's USPTO attorneys of record, defendants never even edited or filed Plaintiff's long form draft application, and never perfected the two provisional application synopses into formal PCT or US applications consistent with Plaintiff's long form draft, as they did for Legend and other clients. In this case, non-publication, that is preferred, could have prevented Apple's outsourcing of Plaintiff's inventions starting in 2008. To date, Apple has no patent but, upon belief, copied sections and ideas from Plaintiff's published disclosure to attempt to get its own patent on the same technology, but to date has failed in that attempt, with an appeal currently pending. [Rosenthal (Apple assignee) application no. 2008-082491].

In the interim, Apple released the Passbook portal in 2012 to service entities with secondary ticketing systems including Cowan's client who were former defendants in this lawsuit.

32. As soon as Plaintiff's appeal was filed and sent to the Merit Panel of the Second Circuit, Instant Live Concerts, LLC and Next Ticketing, Inc. were both dissolved by Live Nation and Clear Channel, requiring any possible recovery of back logged damages from the parents.

33. However, most egregiously Cowan defendants actually aided and abetted Sandrew and Legend's patent theft from Plaintiff by allowing Legend's officers to induce breach of Cowan's fiduciary duties and omitting Plaintiff's name as co-inventor on the PCT filing.

34. Cowan defendants in fact secretly learned as early as February, 2002 that Legend's CTO Barry Sandrew had integrated Plaintiff's digital conversion and editing ideas, inventions and trade secrets in to a concealed provisional digital application without Plaintiff's knowledge or consent. Sandrew filed his provisional using an outside attorney, even though he had already listed Plaintiff as general counsel in Legend's investors' prospectus. Cowan defendants secretly got the provisional from Sandrew and was told to perfect within the one year statutory period, that ended on May 6, 2002. (Sandrew Provisional patent Appl. No. 60/288929 filed May 4, 2001).

35. For the previous 8 years and since 1993, Cowan defendants knew that Sandrew had in fact abandoned his analog film colorization applications that were works-for-hire for his employer American Film Technologies, Inc. of NY ("AFT"); and in 1999 was trying to acquire the applications as assets in AFT's Delaware bankruptcy proceeding and via Sandrew's partner Jeff Yapp, asked Plaintiff to help in that regard. Sandrew after seeing Plaintiff's work and having Yapp sign an NDA, still unlawfully stole her ideas and inventions without Plaintiff's knowledge or consent.

36. Between February, 2002 and at least until May 6, 2002, Cowan and Sandrew individual were partners to a conspiracy to steal Plaintiff's inventions. Cowan did not get a retainer agreement from Sandrew or Legend. Such retainer would have had to have passed through Plaintiff's office and the idea was to keep the work concealed.

37. Instead of disclosing Sandrew's intent to commit fraud and patent theft, Cowan defendants elected instead to aid and abet Sandrew's cause. Cowan defendants, already obligated to Plaintiff as her attorney, allowed Sandrew to induce breach of fiduciary duty to Plaintiff to perfect his theretofore concealed provisional (60/288929) and filed the PCT application in Sandrew's sole name without listing Plaintiff as co-inventor in violation of 37 CFR §1.48. Cowan defendants then assigned the PCT as filed to Legend Films, LLC.

38. Immediate after filing and assignment, Cowan defendants then discovered that new Legend management was taking the position that Plaintiff was never General Counsel of Legend, contrary to the company's 2001 prospectus.

39. The smoking gun is that Cowan nonetheless followed Sandrew and Legend's orders and purged and withheld the relevant files from Plaintiff's e-directories "at the client's instructions". The relevant emails are in Cowan's December, 2012 first document production.

40. Plaintiff contends, therefore, that the sum total Cowan defendants' heinous misconduct in furtherance of a conspiracy with Legend officers aimed at stealing Plaintiff's intellectual assets, tolls all prevailing statutes of limitation on fraud, conspiracy and patent theft causes of action; and warrants punitive damages in Plaintiff's favor based on Cowan and its attorney's continuing fraud and frivolous litigation before this Court and the Second Circuit for the last eight years needlessly forcing Plaintiff to incur exorbitant fees and costs for federal litigation.

III. PATENT AND TECHNOLOGY DESCRIPTION

41. Plaintiff's valuable inventions that were given to Cowan defendants to protect in 2001 are in mobile ticketing, premium performance ticketing (secondary ticketing operations that authenticate sales) and in digital editing and conversion that enable packaging and authenticated transmission of event and broadcast content direct to user devices without the user's need to access an online retailer. Plaintiff's separate, networked apparatus designs are distinct, unique location-based kiosks and hardware machines targeted for airports, hospitality venues, hotel lobbies, shopping malls, ATMs, promenades and public spaces. All Plaintiffs inventions have stood the test of time in the evolving mobile and digital content markets.

42. At the time of Cowan's retainer, only two *primary* mobile ticketing patent applications had been filed by inventors - US inventor Yu whose invention was a work- for-hire for Hewlett Packard of California, and Japanese inventor, Hesegawa. Neither inventor had yet been issued patents. Both inventors' filings, however, would have shown up on a patent search had Cowan defendants performed one as it did for Legend's officers. The results of patent search, for example, would have qualified Plaintiff's inventions from this limited prior art for examiners and vastly reduced Plaintiff's patent prosecution costs, time of prosecution and legal fees. The only prior art, therefore, was in "primary ticketing operations" which are systems that enable entry access control to venues and airlines in both paper and paperless format.

43. For these reasons, the standard of care required that Cowan do the editing and preparation work on Plaintiff's full disclosures as delivered in her formal drafts. Had Cowan done so, defendants and examiners would have discovered that there were no other *secondary* premium ticketing applications of any kind yet filed in the global patent tribunals at the time of Cowan defendants' retainer, and none that package and edit content for real time transmission over electronic networks and pay all royalties for the legal

transmission of digital music. Plaintiff's applications were the first in the world and of tremendous value and utility.

44. Further because of Cowan defendants' bad faith and heinous back stage misconduct, Plaintiff was not successful in her attempts to consummate joint ventures for her inventions in 2004-5 when the claims *should* have issued. Plaintiff's offer to joint venture with Cowan client Live Nation, for example, was ignored. Live Nation's Stephen Prendergast in fact told Plaintiff he believed that anyone could use patents and he would have to be sued to pay Plaintiff royalties.

45. For these reasons and based on the unprecedented delay, Plaintiff has been relegated into a business she never intended, i.e. getting more patent claims issued to enforce against Cowan's clients and also Apple now requiring exorbitant fees and costs. (See, Apple (Rosenthal) Appl. No. 82491 filed September 30, 2008).

46. Cowan defendant Christopher Jensen first wrote Plaintiff on April 28, 2003 noticing Cowan would not perfect Plaintiff's provisional synopses. The letter was mailed three weeks prior to the due date for perfected applications, leaving Plaintiff to the wolves with Cowan improperly retaining Plaintiff's money and leaving Plaintiff just three weeks to prevent lapse of the inventions into the public domain with limited funds. Plaintiff was denied pro se privileges at the USPTO because Cowan defendants were still listed as attorneys of record.

47. On May 7, 2002, and as found by SDNY Arbitrator, Plaintiff's separate of counsel business development agreement negotiated by Audrey Golden was terminated by Cowan defendants without cause. The contract had just been signed and date stamped with the firm's computer codes by Cowan managing defendant Borchard three weeks earlier on April 17, 2002. During this meeting, Cowan still kept concealed the extensive patent work being done over the prior three months for Sandrew defendant R. Lewis Gable with defendants' Borchard supposed supervision.

48. Three Cowan defendant partners Borchard, Gerson and Peter Porcino told Plaintiff they merely “changed their mind” and in fact falsely and fraudulently denied to Plaintiff’s face that any patent work had yet been done for Legend. Defendants expressly said there was no retainer agreement and no retainer funds yet paid to the firm. Defendants also falsely told Plaintiff she had not contributed enough outside billings to the firm when in fact Gable was doing Legend’s PCT work for months and Plaintiff had made the introduction between Jeff Yapp and Borchard in December, 2001.

49. Sometime after the termination date and while still concealing Sandrew’s PCT assigned to Legend, Cowan defendants unilaterally and fraudulently masterminded a forgery of Plaintiff’s contract rider to create a photocopy self-serving to Cowan and its attorneys. The forgery includes a new date stamp of May 8, 2002, after the dates both of the PCT filing and Cowan’s repudiation of Plaintiff’s contract. In further breach of the attorney client privilege, Cowan defendants or their attorney, sent the forgery to Legend’s attorneys in San Diego, California. The first time Plaintiff saw that forgery was during a deposition in CA in March, 2010.

50. That Cowan actually knew of irreconcilable conflicts with other clients including Legend in 2002 was admitted but without specificity in Cowan’s 2003 USPTO form when Cowan first unilaterally moved to withdraw from Plaintiff’s representation. The form notice says that a “*conflict of interest had arisen*” but did not identify the nature and source.

51. Cowan defendants and their attorneys have since blatantly lied and engaged in continuing frivolous litigation before this Court, falsely alleging that the stated conflict pertained only to Cowan’s retention of Plaintiff’s retainer money.

52. Because Cowan’s 2003 USPTO withdrawal notice was never served on Plaintiff, under NY law, it was not effective to terminate Cowan’s patent retainer on the noticed application or from the second application from

which no withdrawal was ever filed. Protostorm v. Antonelli, Terry, Stout, et al., 834 F. Supp. 2d 141 (EDNY 2011).

53. USPTO archives confirmed in 2005 that Cowan's attempted withdrawal and was filed as to only one of the two provisional applications ti filed for Plaintiff. In addition, USPTO Commissioner told Plaintiff her applications would have to be taken out of the normal prosecution queue at the USPTO until the issue of Cowan's incomplete withdrawal was resolved to the Commissioner's satisfaction. The relevant documents have been requested in Plaintiff's FOIA requests .

54. In December, 2001 Cowan managing defendants sent Audrey Golden a deal memorandum agreeing to pay Plaintiff \$200,000 for a one-year guaranteed contract for her business development services. Cowan defendant Borchard's arbitration testimony before this Court on March, 2009 is that he did not hire Plaintiff to perform trademark or other legal work; defendant Jensen admitted in e-mails that Cowan wanted interest in Plaintiff's patent, in spite of a known reservation of rights in and to her inventions in Plaintiff's contract.

55. Cowan defendants, however, failed to provide Plaintiff with its client lists and by such bad faith, in fact prevented Plaintiff's performance of the business development job the firm retained her to do. This was acknowledged by SDNY Arbitrator. The fact that the designated patent attorneys who were supposed to do Plaintiff's work, Michael Wolfson and William Dippert exited the firm two weeks after Plaintiff began working, demonstrated that the entire deal was a sham to steal Plaintiff's contact lists and inventions.

56. Plaintiff fulfilled her obligation to bring in some new clients by introducing Legend Films' President and CEO, Jeff Yapp, to Cowan defendant William Borchard. That connection gave Cowan months of work that was concealed from Plaintiff intentionally.

57. Suspiciously, Cowan defendants Simon Gerson, Borchard and administrator Ingrid Kangur refused Plaintiff the right to address her own announcements. Defendants Simon Gerson and Amy Rosenthal took Plaintiff's Rolodex and never returned it.

58. That Cowan accepted an unearned retainer is a given. Plaintiff's first checks for of counsel development services were based on the \$200,000 fixed base salary negotiated by Audrey Golden; but within four weeks and after the partner's meeting in February, 2002 Cowan defendants reduced Plaintiff's salary, subtracted \$50,000 for patent searches and thereafter paid Plaintiff based on a reduced \$150,000 guarantee. During 2002, Cowan defendants paid only less than half that sum and the remainder was awarded to Plaintiff in Arbitration on limited contract claims, which was the only evidentiary hearing in the entire lawsuit.

IV. DEFENDANTS DECEMBER 2012 FIRST DOCUMENT PRODUCTION

59. Unbeknownst to Plaintiff, and for several months before Cowan's without cause repudiation of the of counsel agreement, Cowan defendants were in fact secretly performing patent work for Legend Films' CTO Barry Sandrew without a required retainer agreement, and preparing Sandrew's first formal digital patent application for filing. During this time, Cowan defendants got Sandrew's theretofore concealed May 4, 2001 provisional application and recognized or should have recognized a conflict with Plaintiff's inventions that Cowan was already obligated to protect. Plaintiff was the superior patent client in time and right by several months but Cowan defendants wrongly elected to do Sandrew's work instead of Plaintiff's.

60. Cowan defendants worked without Sandrew's retainer and none is in Cowan's production. This is because any retainer contract for Sandrew or Legend would have had to have passed through Plaintiff's office as Legend's General Counsel; and none was ever prepared or generated; because the idea

was to conceal that for almost a year Sandrew was using Plaintiff's inventions without authorization and to keep Plaintiff out of the loop.

61. On May 6, 2002 Cowan defendants not only filed a concealed PCT application for Sandrew incorporating Plaintiff's inventions but failed to list Plaintiff as co-inventor of the disclosed digital conversion and editing technologies integrated therein in violation of 37 CFR §1.48.

62. A PCT filed prior to a formal US application perfecting a provisional is not published and by these means, Cowan was able to keep its acts in furtherance of the conspiracy concealed from Plaintiff. The PCT with Cowan's name as filer is not on the USPTO website.

63. On or about May 12, 2002, Cowan defendants Christopher Jensen and Mark Montague, having Plaintiff's retainer money, and still keeping the Legend PCT concealed, told Plaintiff they would finally file her patents. However, defendants still never sent Plaintiff the promised retainer agreement that is required under NY statutes.

64. Still concealing their conflicts and the PCT filed for Sandrew, Cowan defendants told Plaintiff in July, 2002 they had decided to reject defendant Yapp's stock for services offer and were going to require that Legend pay a cash retainer. On or about July 30, 2002, defendant Yapp sent Cowan a retainer check of \$10,000.

65. For the next 12 years, the new corporate entity Legend Films LLC, that became Legend Films, Inc. in 2003, and is now Legend 3D, Inc., made most of its \$50 million in profits restoring older black-and-white Hollywood classic films and TV series negatives such as the Shirley Temple Films, "Casablanca", and the "Three Stooges" for studios and producers using the all-digital masking method integrating Plaintiff's technologies. The colorization films did not take off in the market as Plaintiff as predicted and advised Yapp in 2000.

66. However, based on Cowan defendants' conversion, patent malpractice and breaches of fiduciary duty and attorney clients privilege to Plaintiff, Sandrew and not Plaintiff were awarded the first digital film colorization patent in February, 2007 (7, 081,181). That patent was based on a formal US application filed by the Procopio law firm in San Diego (US Appl. No. 10,450,970) that was a carbon copy of the unpublished PCT Cowan filed for Sandrew on May 6, 2002, after Procopio got Cowan's PCT files.

67. On or about May 15, 2002, Cowan defendants, having repudiated Plaintiff of counsel contract a week earlier and still concealing Legend's work and the known conflicts, finally told Plaintiff it would file her patent applications. The e-mail from defendant patent attorney Mark Montague, with a cc: to partners Jensen and Borchard provided that the delay was that he had to get the permission of Cowan managing partners.

68. On or about April 28, 2003, close to a year later, Plaintiff received a letter from defendant partner Jensen, informing that Cowan defendants would not perfect Plaintiff's provisional applications. Plaintiff then asked for all her files and billings. Plaintiff never got her patent billings to this day; but did receive a CD ROM with multiple e-files deleted as alleged in all Plaintiff's complaints to date in this lawsuit. Plaintiff never learned the contents of the purged files until December, 2012 from Cowan's first discovery production after more than 10 years.

69. About the same time, the USPTO noticed Plaintiff that Cowan defendants had filed a USPTO withdrawal notice and there was no proof of service. USPTO confirmed from its archives that the withdrawal referred to only one of the two provisional filed by Cowan there was no proof of services and a docket sheet provided that Cowan remained Plaintiff's attorney until September, 2003.

70. Under federal law, because Cowan's notice was not served, it was ineffective to terminate Cowan defendants' retainer. Protostorm v Antonelli, Terry, Stout, et al., 834 F. Supp. 2d 141 (EDNY 2011).

71. Upon information and belief no further work was done by Cowan after May 24, 2002; and no work commensurate with the retainer Cowan accepted was ever performed or earned.

72. Five days later on May 5, 2003 an article written by Matthew Mirapol was printed over six columns in the *New York Times* Business Section announcing Clear Channel's newest venture, Instant Live Concerts, LLC; and that ticketing information was being used to authenticate expedited CD handouts at Clear Channel's smaller Boston clubs. The ads for the new service appeared on Instant Live's 2003 first website and were immediately removed when Plaintiff called Clear Channel General Counsel Dale Head, Esq. in San Antonio, TX.

73. The *New York Times* article quoted terms of art from Plaintiff's provisional applications that were never published including "to capture otherwise live lost content". In addition, members of Phish were interviewed. They are Cowan clients, as is the *New York Times*. That Michael Gordon and Phish perform at Clear Channel venues is strong evidence that Plaintiff's confidential information was leaked through Cowan associate Susan Schick.

74. When Plaintiff called Cowan immediately after seeing the article, she was again threatened by defendant Christopher Jensen; and warned about continuing to call any attorneys or members of the firm.

75. In 2007, the USPTO invalidated a master recording patent – Griner⁴ – that had been acquired by Live Nation in 2005. The invalidation was based on the issued patent's non-utility in a proceeding filed by the Electronic Frontier Foundation of San Francisco. This left Plaintiff with the only viable expedited packaging and distribution methods for transmitted event content. The lack of issued patent claims caused Plaintiff's attempt to negotiate royalties to be ignored.

⁴ Griner US Patent No. 6917566 (2005)

76. Cowan's torts and misconduct also enabled Live Nation and its new merged partner Ticketmaster as of 2010 to preclude Plaintiff's inventions from their market share of event venues. The merged entity, upon information and belief, is violating the DC District Court and DOJ's January 2010 consent decree and competitive impact, both in effect until 2020, by precluding Plaintiff's secondary ticketing operation from their market share of event venues. The revenues being made from continued use of Plaintiff's inventions is public record in the entity's SEC 10K filings and annual reports.

77. On or about March 23, 24, 2009, Cowan defendant William Borchard testified at the Arbitration before this Court; but the remaining five Cowan defendant partners who were scheduled to testify never showed up, causing additional fees to Plaintiff.

78. On or about April 27, 2009, this Court, Hon. Barbara Jones, sua sponte dismissed Plaintiff's lawsuit requiring an expensive appeal to the Second Circuit, with a stay of appeal ordered until September, 2010.

79. On August 4, 2009, the Arbitration Award in Plaintiff's favor was entered against Cowan defendants on all counts; but somehow not docketed. Cowan defendants were ordered by SDNY Arbitrator to pay the outstanding remainder of Plaintiff's \$150,000 reduced guarantee. The Arbitration Award was the only evidentiary hearing in this lawsuit in eight years and also found the chronology relevant to Cowan defendants' fraud wrongful inducement and tort claims. It remains missing from the SDNY docket sheet in spite of several applications filed by Plaintiff to have it entered. To date, SDNY never adjudicated Cowan defendants' breach of Plaintiff's patent retainer.

80. On October 13, 2009, during the stay of appeal, Plaintiff received notice of lost patent claims in her first issued US patent based on the inventions Cowan defendant were given to protect in December, 2001. October 13, 2009 is when actual injury occurred to Plaintiff started the statute of limitations running on malpractice and breach of fiduciary causes of action, and the causes of action for fraud and aiding and abetting Legend's patent theft

are tolled further because of Cowan's intentional file purging. (*Protostorm v. Antonelli, Terry, Stout, et al.*, 834 F. Supp. 2d 141 (EDNY 2011); *Micron Technology v. Rambus*, 645 F. 3d 1311 (D. Del. 2013).

81. Sixteen of Plaintiff's patent applications are still pending in the US and Europe before the USPTO and EPO and are requiring exorbitant extension and renewal fees to get the claims issued, that should never have been necessary.

82. Cowan defendants' failure to list Plaintiff as co-inventor of Sandrew' PCT and US disclosures in violation of 37 CFR 1.48 cannot be remedied.

83. As a result of Cowan defendants' breach of a Federal Act of Congress, therefore, and defendants' allowing wrongful inducement, breach of fiduciary duty, attorney client privilege to establish a success patent theft scheme, Plaintiff in fact lost Plaintiff the right to participate in all of Legend's patent services retainers, customization contracts and patent royalties over the past 12 years; as well as Legend's profits.

84. That these files were purged demonstrates why Plaintiff's claims were not stated in a previous complaint.

85. Cowan clients: Instant Live Concerts, LLC and Next Ticketing, Inc. who have been using Plaintiff's inventions and patents without authorization or license since 2003 and outsourced them based on Cowan's wrongful enablement, were dissolved shortly after Plaintiff's first patent issued.

86. Based on the heinous nature of Cowan's misconduct and bad faith, Plaintiff contends that punitive damages must be recoverable in this lawsuit; along with Plaintiff's attorneys' fees and costs including for any appeals and additional fees and costs to continue prosecution before the patent tribunals.

87. Cowan managing defendants were obligated to supervise but failed to supervise the firm's defendant patent attorneys and support staff concerning services covered by Plaintiff's patent retainer to protect Plaintiff's inventions to the full bounds of the law.

88. In this lawsuit, Cowan defendants and their attorneys also engaged in frivolous litigation and alteration of material evidence to defraud Plaintiff and the Court, causing Plaintiff further prejudice in this lawsuit, that must be compensated.

V. PARTIES

89. Plaintiff is an individual inventor/entrepreneur and a resident of Montclair, NJ.

90. Defendant Cowan Liebowitz & Latman, PC ("Cowan") is an intellectual property law firm and professional corporation with its principal place of business at 1133 Avenue of the Americas, New York, NY 10036.

91. Individual defendants William Borchard, Christopher Jensen, Simon Gerson, Midge Hyman and Baila Celedonia are managing partners of Cowan; and defendants R. Lewis Gable and Mark Montague were patent attorneys at Cowan for the minimum relevant period December, 2001 – September, 2003. It is unknown if complete diversity exists between Plaintiff with each of individual defendants who were added by S&F in Plaintiff's 3AC filed in 2008.

92. The terms "Cowan" and "Cowan defendants" as used herein refers collectively to the law firm defendants, its managing partners and patent attorneys.

VI. JURISDICTION

93. Jurisdiction is based on Cowan defendants' violation of an Act of Congress, 37 CFR § 1.48, because defendants filed Sandrew's concealed PCT application on May 6, 2002 in Sandrew's sole name, without listing of Plaintiff as co-inventor; and this violation cannot be remedied. This lawsuit, therefore, arises under an Act of Congress pertain to US Patent Laws, 28 USC §§ 1331, 1338 based on Cowan defendants' defiance and violation of a federal statute pertaining to patents. [37 CFR §1.48].

94. It is unknown whether there is complete diversity between Plaintiff and the individual Cowan defendants in the 3AC filed in 2008 by S&F claims from which were upheld by the Second Circuit prior to Cowan's first document production in December, 2012. The amount in controversy exceeds \$75,000. 28 USC § 1332.

95. With the exception of Plaintiff's claims under 37 CFR§ 1.48 there is no exclusive jurisdiction of the federal courts to hear Plaintiff's patent-related state claims for fraud, aiding and abetting patent theft and conspiracy that are stated in this 6ACbasedon newly discovered evidence, per Gunn v. Minton, 133 S. Ct. 1059 (IUSSC Tex. 2013) (Roberts, J.).

96. Venue is proper in this District pursuant to 28 USC §1291 because the Cowan defendant law firm is a resident of this district and a substantial part of the events or omissions that Cowan defendants undertook or failed to undertake that give rise to Plaintiff's claims occurred in this district.

VII. CONCLUSION

WHEREFORE, Plaintiff prays judgment against Cowan defendants as follows:

- (1) For damages for breach of Plaintiff's patent retainer;

(2) For damages for conversion of Plaintiff's patent retainer monies;

(3) For damages for allowing other Cowan clients to induce breach of fiduciary duty and attorney client privilege to Plaintiff, including, without limitation, the duties of complete and absolute confidentiality and loyalty, which such breaches directly concern Plaintiff's inventions, ideas and trade secrets including, without limitation, those contained in Plaintiff's unpublished provisional patent applications filed by Cowan defendants;

(4) For damages for entering a concealed conspiracy with Legend Films and its officers the premise of which was to aid and abet theft of Plaintiff's inventions including, without limitation, by not crediting Plaintiff as co-inventor in Legend's May 6, 2002 patent filings in violation of 37 CFR§1.48, causing Plaintiff to lose and forfeit claims in her issued patents and the right to participate in Legend's patent royalties, customization contracts, and corporate profits;

(5) For damages for allowing other clients Clear Channel and Live Nation, Phish, Legend, MLB (and MLB Advanced Media) and the New York Times to induce defendants' breach of fiduciary duties to Plaintiff and breach Plaintiff's attorney client privilege as to her confidential communications, inventions, ideas, and trade secrets including those contained in her unpublished provisional patent applications;

(6) For damages for disgorgement of expanded retainers and legal fees obtained from other clients who are using Plaintiff's inventions or applications of Plaintiff's inventions;

(7) For damages for Plaintiff's lost patent royalties, service retainers and customization contracts since 2003 from all Cowan clients and non-client including, without limitation, Apple Computer, Apple Inc., and others;

(8) For damages for purging Plaintiff's files, spoliating and unilaterally altering evidence therefrom to impede Plaintiff's notice and discovery of the scope of her claims against Cowan defendants and prejudicing Plaintiff's interests in this lawsuit by defrauding Plaintiff and this Court. Micron Technology v. Rambus, 645 F. 3d 1311 (Fed. Cir. 2012);

(9) For damages for engaging in frivolous and untruthful litigation in this lawsuit that prejudiced Plaintiff's rights of adjudication and discovery before SDNY and Second Circuit for eight years;

(10) For damages for fraud, for misrepresenting material facts to Plaintiff concerning her inventions and Cowan's conversion, inducing Plaintiff's reliance; and luring Plaintiff's to the Cowan firm and to accept an offer over Moses & Singer under false pretenses;

(11) For damages patent fees, attorneys' fees and costs incurred by Plaintiff in the US and Europe to continue prosecution of patent proceedings prejudiced by Cowan defendants;

(12) For damages for Plaintiff's lost business advantages, business expenses, and investor monies caused by Cowan's enabling its clients and others to outsource Plaintiff's inventions or applications of Plaintiff's inventions;

(13) For damages to Plaintiff's hardware, software and businesses including lost investor's seed capital and engineering;

(14) For an award of Plaintiff's attorneys' fees and costs in this lawsuit based on unfair play including outstanding costs already awarded by the Second Circuit and to cover any further appeals;

(15) For such other and further relief as the Court deems just and proper.

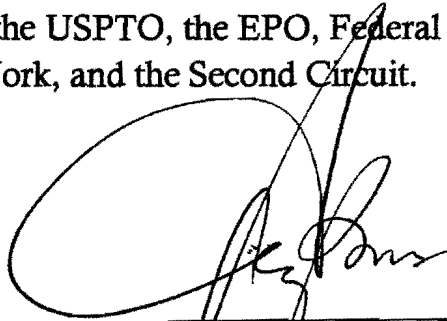
VIII. JURY TRIAL

Pursuant to FRCP Rule 38, Plaintiff demands a jury trial on her claims.

IX. CERTIFICATION

Plaintiff certifies and declares that the statements and allegations in Plaintiff's proded Sixth Amended Complaint ("6AC") are true to the best of her knowledge and belief; and as to those statement made upon information and belief, Plaintiff believes same to be true based on her files, those of her previous attorneys, the files of the USPTO, the EPO, Federal District Court of the Southern District of New York, and the Second Circuit.

Dated: March 9, 2014
Montclair, NJ



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY R. GURVEY,

Plaintiff-Inventor *Pro se*,

Case No. 06 Civ. 1202
(LGS)(HBP)

v.

COWAN, LIEBOWITZ & LATMAN,
PC, WILLIAM BORCHARD, MIDGE
HYMAN, CHRISTOPHER JENSEN,
SIMON GERSON, R. LEWIS
GABLE, MARK MONTAGUE, AND
BAILA CELEDONIA, ET AL.,
(Collectively "Cowan defendants").

**PLAINTIFF PRO SE'S
DECLARATION IN SUPPORT
OF MOTION TO FILE AND
SERVE A SIXTH AMENDED
COMPLAINT ("6AC") BASED
ON COWAN DEFENDANTS'
FIRST DOCUMENT
PRODUCTION**

Defendants.

Plaintiff pro se Amy R. Weissbrod Gurvey declares to the truth of the following statements under penalty of perjury in support of her annexed motion of even date that is returnable March 19, 2014 at 9:30 am in the forenoon seeking to file a Sixth Amended Complaint and to stay adjudication of Plaintiff's filed motion seeking remand to the Supreme Court of NY, NY County pending adjudication of the instant motion that is based on Cowan defendants' first production of documents in this lawsuit in December, 2012 after 7 ½ years:

1. This lawsuit was commenced by summons and complaint on February 15, 2006 seeking damages, *inter alia*, for fraud, patent malpractice, breach of fiduciary duty, antitrust, unfair competition and misappropriation of Plaintiff's inventions which are now the subject of two issued US patents as of October 13 2009 and November 1, 2011, with the first claims issued during the stay of appeal ordered by Second Circuit. Seventeen patent applications from this portfolio remain pending in the US and European patent offices.

2. The original defendants was intellectual property firm Cowan Liebowitz & Latman, PC, and its clients Clear channel Communications, Inc., Clear Channel Entertainment, Inc. Spinco that became Live Nation, Inc., the leading concert promoter and venue owner in the United states, Phish, and newly formed Clear Channel subsidiaries, Instant Live Concerts, LLC and Next Ticketing, Inc. Subsidiaries were since immediately dissolved as soon as Plaintiff's first US patents issued and Plaintiff's opening brief had been filed at the Second Circuit in August, 2011.

3. A cause of action for patent malpractice accrues when the Plaintiff-inventor is noticed by a patent office of lost and/or forfeited patent claims attributable to the defendant attorney's retainer, breach of fiduciary duty or breach the standard of care for patent attorneys. Protostorm v. Antonelli, Terry, Stout, et al. 834 F. Supp. 2d 141 (EDNY 2011). As to Plaintiff, notice of lost claims Cowan was given to protect occurred on October 13, 2009.

4. Cowan was retained for patent services in December, 2001 to edit and file a formal version of Plaintiff's long form draft application that included specifications, figures, drawings, schematics and draft claims in mobile ticketing, premium performance ticketing and digital editing and conversion systems that package and distribute event and broadcast content in real time for transmission to electronic devices.

5. Sherman antitrust claims were pleaded by Plaintiff's attorneys Squitieri & Fearon, LLP ("S&F") against Clear Channel and Live Nation because in 2005 Live Nation acquired a master CD recording patent, Griner ¹, issued false and misleading press releases that it owned a monopoly on distributing live concert recordings, used its acquisition of Griner in bad faith to preclude other recording firms from entering its venues to record concerts of artists.

¹ Griner US Patent No. 6917566 (2005)

6. In 2007 the Electronic Frontier Foundation moved before the USPTO to invalidate the Griner patent based on non-utility, and won that proceeding, leaving Plaintiff with the only remaining premium ticketing and content editing patents, then pending.

7. S&F previously sued Clear Channel for a ticketing antitrust lawsuit before SDNY in 2006, and acquired jurisdiction over defendant based on its ownership of 145 concert venues in the tri-state area. The same allegations were pleaded by S&F in Plaintiff's complaint but the District Court found there was no jurisdiction in order of March 17, 2009 S&F then failed to file a notice of appeal, divesting Second Circuit of jurisdiction to hear Plaintiff's appeal against Clear Channel and Live Nation on what were blatantly false jurisdictional papers.

8. When this lawsuit was filed in 2006 and when this case went on appeal, Plaintiff still had no issued US patents; and only knew of unlawful outsourcing of her inventions by three of defendant Cowan's clients and their new subsidiaries, Clear Channel, Live Nation, Instant Live Concerts, Inc., Next Ticketing, Inc. and members of Phish. A 6-column article published in the New York Times Business Section on Monday on May 5, 2003 by Matthew Mirapol, quoted from Plaintiff's unpublished provisional patent applications filed by Cowan on May 22 and 22, 2002 respectively; and members of Phish were interviewed in the article. Phish and The New York Times are also Cowan trademark clients; relevant emails support misappropriation of Plaintiff's inventions during 2002 by partners of the firm and a senior associate, Susan Schick, then engaged to and now married to Phish's bass guitarist, Michael Gordon.

9. Had Plaintiff not filed suit, the statute of limitations on legal malpractice and breach of fiduciary duty claims would have lapsed. Plaintiff previously grievances against Cowan and attempt to get back her retainer and get the help of the First Dept. Disciplinary Committee were ignored. FDDC ignored grievances of other inventors; and upon belief, an inventor has never been awarded damages for patent malpractice before this tribunal.

10. Cowan defendants were retained in December, 2001 and accepted a \$50,000 retainer from Plaintiff; but performed no services at all on Plaintiff's long form patent drafts for close to six months, i.e., until May 22 and 24, 2002. On these dates, Cowan defendants R. Lewis Gable and Mark Montague - after

consulting with Cowan management partners – finally submitted a submitted two synopses of Plaintiff's long form drafts to the USPTO as two provisional patent applications. (Apples. Nos. 60/382,710; 60/382,949). They were poor excuses for provisional application in that they did not included Plaintiff's schematics, drawings, specifications, utility descriptions or draft claims that Cowan should have edited and then filed in connection with these applications.

11. Cowan then in breach of the standard of care for patent attorneys, did not perform any follow-up services commensurate with the retainer or file the formal applications for Plaintiff. In addition, Cowan did not perform patent searches, waived Plaintiff's right to exercise rights to expedited prosecution and to prevent US publication. In fact, Cowan defendants never even advised Plaintiff of her right to get expedited prosecution within 18-24 months.

12. In 2003, Cowan defendants allegedly attempted to withdraw from one of the two applications at the USPTO in 2003, without ever serving Plaintiff with that notice. That notice admitted to a "conflict of interest" as the grounds. There is no proof of service on the USPTO records, and Cowan is listed as Plaintiff's patent attorney of record until September, 2003. Cowan never disclosed the source and nature of its admitted conflict to Plaintiff.

13. Throughout this litigation, Cowan and its attorney Richard Supple, Esq. have blatantly lied that the "conflict" pertained to Cowan's failure to pay Plaintiff monies owed.

14. There was an inordinate, prejudicial delay in Plaintiff getting any discovery rights in this lawsuit for 8 years, including because Cowan and their attorney Supple doctored the files previously purged from Plaintiff's directories and submitted the altered documents in support of frivolous motions to this Court. Alteration of material evidence constitutes spoliation in the patent context. *Micron Technology v. Rambus*, 645 F. 3d 1311 (D. Del. 2013)

15. The SDNY Arbitrator's order of August 4, 2009, was in Plaintiff's favor on limited contracts counts against Cowan but found the chronology relevant to tort claims, expanded bad faith and misconduct claims, that include conspiracy to aid and abet patent and technology theft from Plaintiff, now discovered and established. To date, the Award of Arbitration nonetheless

remains missing from the SDNY docket sheet in spite of Plaintiff's applications to have it entered.

16. Other issues of poor document housekeeping caused Plaintiff's appeal to the April 27, 2009 order of Judge Barbara Jones closing the case, to be sent to the Merit Panel; and documents such as the date stamped version of Plaintiff's Rule 60(b) motion and 4AC that were stamped by the SDNY Cashier on April 22, 2010 and also never docketed.

17. The Second Circuit's order expressly acknowledged Plaintiff's fraud claims on pp. 1 of that order and cited to *Ulico v. Wilson Elser, et al.*, 56 AD 3d 1 (AD 1st Dept. 2008) finding that Plaintiff's claims that Cowan used information obtained during a confidential attorney client relationship and gave that information to benefit itself and its clients were viable claims.

18. On April 16, 2012, post remand from the Second Circuit, Judge Barbara Jones ordered a discovery conference to set a schedule; that hearing was adjourned twice; and in spite of the 4AC that pleaded actual injury to Plaintiff's issued US patent claims, signed an order ex parte authorized Cowan defendants to answer the 3AC.

19. To date the discovery conference to set a schedule has still not taken place after two years (although now scheduled for the return date hereof).

20. On December, 2012, 10 months after Plaintiff's patent malpractice and breach of fiduciary duty claims were upheld by the Second Circuit (462 Fed. Appx. 26) (February 10, 2012), Cowan produced very limited, anemic discovery. However, the CD included several of the emails previously purged from Plaintiff's e-directories by Cowan in 2003 when it unilaterally moved to withdraw at the USPTO from Plaintiff's representation.

21. From this discovery, some 10 years after the fact, Plaintiff discovered that Cowan had unlawfully inserted Plaintiff's digital conversion ideas, inventions and trade secrets into a secret and unpublished PCT patent application Cowan filed for another client, Barry Sandrew, then COO of Legend Films, LLC. The PCT was filed on May 6, 2002, the day before Plaintiff's business development contract was unilaterally repudiated by Cowan on May 7, 2002 without cause as found by Arbitrator.

22. In preparing that application over several months and never providing a retainer to perform that work that would have had to have passed through Plaintiff's office at Cowan, Cowan defendants learned what Plaintiff did not know, i.e., that Sandrew had used an outside attorney to file his first digital black-and-white film masking provisional application on May 4, 2001 and had secretly used Plaintiff's ideas to convert his (Sandrew's) previous analog applications to digital. These previous applications – some abandoned were last prosecuted at the USPTO in 1993, and were works for hire for Sandrew previous employer American Films Technologies, Inc.

23. According to Cowan defendants' document production, Cowan defendants were given the secret provisional Sandrew had filed on May 4, 2001 (60/288,929) using Plaintiff's inventions early in 2002, and were instructed to perfect that into a PCT for Sandrew and to purge all the relevant files from Plaintiff's emails.

24. Cowan also knowing of the patent theft and conflict, nonetheless assigned the PCT to Legend Films, LLC the same day and again did not inform Plaintiff.

25. The smoking gun is that Cowan also did not list Plaintiff a co-inventor of the PCT and filed it in Sandrew's sole name, in violation and defiance of 37 CFR 1.48, an Act of Congress pertaining to patents.

26. The emails first produced by defendants in December, 2012, have not been the subject of any previous complaint filed before this Court.

27. Legend Films apparently terminated Cowan in 2004 and retained a San Diego firm, Procopio et al., to finish prosecution of the Sandrew PCT that remained unpublished; plus to file a corresponding formal US application that was a virtual carbon copy of the PCT filed by Cowan defendants in May, 2002.

28. The US application resulted in a patent to Legend in 2007 using Plaintiff's inventions; and again having been copied from Cowan's PCT, did not list Plaintiff as co-inventor.

29. The original cover letters from Cowan defendant R. Lewis Gable to Procopio in 2003-4 did not include a "cc: to Amy R. Gurvey"; but the corresponding document produced by Cowan defendants in discovery in 2012

somehow did. A self-serving forgery was obviously masterminded by Cowan defendants to defraud Plaintiff and the Court in this lawsuit; and further prejudice Plaintiff's interests and rights of recovery.

30. This is not the first time Cowan defendants and its attorney supple have doctored evidence submitted to the Court.

31. At the commencement of this lawsuit in July 2006 Hinshaw & Culbertson, LLP (Richard Supple, Esq.) frivolously moved to stay discovery and compel arbitration based on defendant Simon Gerson's sworn affidavit that what was appended was Plaintiff's complete contract. The rider to that contract was omitted; it reserved to Plaintiff 3% vested in Legend stock; and was date stamped by Cowan defendant William Borchard on April 17, 2002, as found by arbitrator.

32. A unilaterally forged version of the rider was then sent to Legend's attorneys in California with a new date stamp embossed on May 8, 2002, in breach of attorney client privilege, coincidentally two days after the concealed PCT was filed by Cowan and one day after Cowan's breach of Plaintiff's business services contract on May 7, 2002.

33. The 3AC filed by S&F in this lawsuit does not include any claims for Cowan's fraud, conspiracy with Legend to aid and abet patent theft from Plaintiff, or allowing Legend, Sandrew and other clients to induce Cowan's breach of fiduciary to Plaintiff who was the superior patent client in time and right. Such claims support additional substantial damages such as loss of Legend's patent royalties, customization contracts in film colorization and restoration, and loss of Plaintiff's participation in Legend's corporate profits for 12 years, plus bad faith and punitive damages.

34. Statutes of limitation on these damage claims and punitive damages claims are tolled based on Cowan's bad faith purging Plaintiff's files; and unilateral alteration of original documents in a patent matter that falls within the definition of spoliation as interpreted by federal patent tribunals.

35. There have been more than 5 ex parte untruthful/frivolous applications filed by defendants and Supple in this lawsuit including a recent April, 2012 application to Judge Jones seeking authorization to answer Plaintiff's 3AC, while defendants and Supple still unlawfully withheld the purged evidence, causing further prejudice to Plaintiff in this lawsuit.

36. Plaintiff is entitled to recover additional damages in her 6AC emanating from the Cowan Legend conspiracy, Cowan's substandard patent services far less than performed for Legend in two patent tribunals, and Plaintiff's attorney fees and costs to continue prosecutions of her inventions before the USPTO and EPO since Cowan's abandonment. Plaintiff is also entitled to attorneys' fees and costs in this lawsuit and any further appeals required, to recover still outstanding fees and costs awarded in her favor by the Second Circuit, and such other and further relief as the Court deems just and proper.

37. No prior motion seeking leave to file an amended complaint based on the new evidence produced by Cowan in its first document production in December, 2012, has been made.

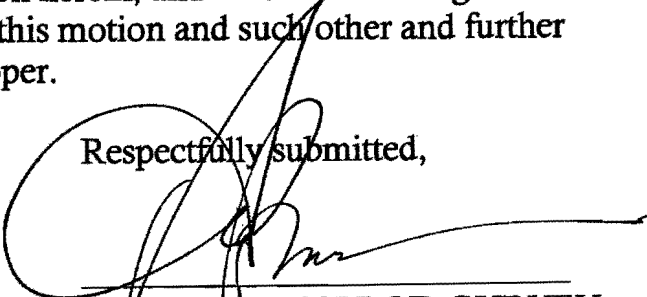
39. Amendments are favored in federal litigation and the new claims in this particular case, considering the heinous nature of the defendant's misconduct - should be liberally construed and granted.

39. There is no possible prejudice to defendants if service of the 6AC is granted. An order of District Magistrate concedes that discovery has just begun and the case is still in its embryonic stages after 8 years.

WHEREFORE, Plaintiff pro se Amy R. Weissbrod Gurvey prays that her motion for to file and serve a 6AC be granted, that her pending motion remand be stayed pending adjudication herein, and that Plaintiff be granted her attorney's fees and costs to bring this motion and such other and further relief as the Court deems just and proper.

Dated: March 11, 2014
Montclair, NJ

Respectfully submitted,



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EXHIBIT 1

09-2185-cv(L)

Gurvey v. Cowan, Liebowitz & Latman, P.C., et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of February, two thousand twelve.

PRESENT:

AMALYA L. KEARSE,

JOSÉ A. CABRANES,

ROBERT D. SACK,

Circuit Judges.

AMY R. GURVEY,

Plaintiff-Appellant,

-v.-

Nos. 09-2185-cv(L)
10-4111 (Con)

COWAN, LIEBOWITZ & LATMAN, P.C., CLEAR
CHANNEL COMMUNICATIONS, INC., LIVE
NATION, INC., INSTANT LIVE CONCERTS, LLC,
NEXTICKETING, INC., WILLIAM
BORCHARD, MIDGE HYMAN, BAILA
CELEDONIA, CHRISTOPHER JENSEN, DALE
HEAD, STEVE SIMON, MICHAEL GORDON,
and SUSAN SCHICK,

*Defendants-Appellees.*¹

¹ The Clerk is directed to amend the official caption as indicated above.

1 **FOR APPELLANT:**

Amy R. Gurvey, *pro se*, Upper
Montclair, N.J.

4 **For APPELLEES:**

J. Richard Supple, Jr., Hinshaw &
Culbertson LLP, New York, N.Y.,
for Cowan, Liebowitz & Latman
PC, William Borchard, Midge
Hyman, Baila Celedonia, and
Christopher Jensen;

Samara L. Kline (Melissa
Armstrong, *on the brief*), Baker
Botts LLP, Dallas, Texas, *for* Live
Nation, Inc., InstantLive
Concerts, LLC, NexTicketing,
LLC, and Clear Channel
Communications, Inc.

19 Appeal from a judgment of the United States District Court for the Southern District of New
20 York (Barbara S. Jones, *Judge*).

22 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
23 **DECREED** that the judgment of the District Court be **AFFIRMED in part and VACATED and**
24 **REMANDED in part.**

25 Plaintiff-appellant Amy R. Gurvey appeals from the District Court's April 23, 2009 judgment
26 dismissing her third amended complaint ("TAC") pursuant to Fed. R. Civ. P. 12(b)(6). We assume the
27 parties' familiarity with the underlying facts and the procedural history of the case, some of which we
28 briefly reiterate here.

29 **BACKGROUND**

30 In February 2006 Gurvey filed her initial complaint in this action, principally asserting claims of
31 misappropriation of trade secrets against all defendants named in the complaint, fraud and breach of
32 fiduciary duty against her attorney, Cowan, Liebowitz & Latman LLC ("Cowan"), and unfair

1 competition and interference with prospective economic advantage against Cowan, Clear Channel
2 Communications ("CCC"), InstantLive, and Live Nation, Inc. ("Live Nation"). Gurvey did not serve
3 the complaint on the defendants at that time.

4 Four months later, in June 2006, Gurvey filed an amended complaint, which added a subsidiary
5 of CCC as a defendant, as well as, *inter alia*, claims of malpractice against Cowan. Gurvey served the
6 first amended complaint on all defendants, and attached a copy of the original complaint.

7 Later, on March 4, 2008, Gurvey filed her third² amended complaint, which forms the basis of
8 this appeal. The TAC added as defendants several partners of and one associate employed by Cowan
9 (together with Cowan, the "Cowan Defendants"), several executives of the corporate defendants, and
10 Michael Gordon, the bass guitarist for the rock band "Phish." The TAC also asserted numerous claims
11 against various defendants for, *inter alia*, misappropriation of trade secrets, unfair competition, breach of
12 fiduciary duty, tortious interference with a contract, tortious interference with prospective economic
13 relations, attorney malpractice, violations of Section 2 of the Sherman Act,³ violations of state antitrust
14 laws, and violations of the Lanham Act.⁴

15 On April 23, 2009, the District Court dismissed the TAC in its entirety.⁵ *Gurvey v. Cowan*,
16 *Liebowitz & Latman, P.C.*, No. 06 Civ. 1202, 2009 WL 1117278 (S.D.N.Y. Apr. 24, 2009) ("*Gurvey II*").

² Gurvey, who filed her initial complaint *pro se*, moved on October 10, 2006 to file a second amended complaint. While that motion was still pending, Gurvey retained counsel and requested leave to file a third amended complaint. The District Court granted permission to file a third amended complaint, deeming the *pro se* motion moot. *Gurvey v. Cowan, Liebowitz & Latman*, No. 06 Civ. 1202, Docket No. 41, at 2 (S.D.N.Y. Jan. 23, 2008) (order granting permission to file third amended complaint).

³ 15 U.S.C. § 2, *et seq.*

⁴ 15 U.S.C. § 1051, *et seq.*

⁵ On March 16, 2009, the District Court dismissed the action against CCC and Live Nation for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2). *See Gurvey v. Cowan, Liebowitz & Latman, P.C.*, No. 06 Civ. 1202, 2009 WL 691056 (S.D.N.Y. Mar. 17, 2009) ("*Gurvey I*"). Although Gurvey claims that this dismissal constituted reversible error, she failed to include in her Notice of Appeal her intent to appeal from this order. *See Gurvey*, No. 06 Civ. 1202, Docket No. 83 (S.D.N.Y. Sept. 23, 2010) (Notice of Appeal). We therefore do not have jurisdiction to decide her claim that the District Court erred by dismissing her claims against CCC and Live Nation for lack of personal jurisdiction. *See Shraeder v. CSX Transp., Inc.*, 70 F.3d 255, 256 (2d Cir. 1995).

1 The court determined that Gurvey's claims of misappropriation of trade secrets, unfair competition, and
2 tortious interference with contract claims were time-barred. The court also determined that her state
3 and federal antitrust claims, as well as her unjust enrichment claim, had been inadequately pleaded. It
4 further found that Gurvey's false advertising claims under the Lanham Act were related to the
5 authorship of her allegedly proprietary ideas and therefore were not properly the subject of an action
6 under the Lanham Act.

7 With respect to Gurvey's claims for tortious interference with prospective economic relations,
8 the court concluded that Gurvey's allegations—that, because Cowan illegally revealed her proprietary
9 information and trade secrets to CCC and Live Nation, she lost the opportunity to complete a private
10 placement offering of securities to be issued by her own company—were too vague to give rise to a
11 plausible claim for relief. The court determined that the TAC neglected to allege that defendants knew
12 of Gurvey's private placement opportunity when they allegedly wrongfully interfered with the
13 opportunity, and therefore dismissed the tortious interference claim.

14 Finally, with respect to Gurvey's legal malpractice claims against the Cowan defendants, the
15 court concluded that Gurvey had offered only "vague and non-actionable challenges" to defendants'
16 legal representation. Gurvey's allegation that defendants had failed to protect the confidentiality of her
17 trade secrets was not premised on "anything more than speculation" and did not present a challenge to
18 the actual quality of defendants' legal representation. In addition, Gurvey's allegation of a conflict of
19 interest did not include any detail as to the supposed conflict. Moreover, the court determined that
20 Gurvey had failed to identify the precise damages she had suffered or how defendants' legal
21 representation had actually caused these damages. Gurvey's breach of fiduciary duty claims against the
22 Cowan defendants were dismissed for similar reasons.⁶

⁶ The District Court also dismissed Gurvey's claim for an accounting because an accounting is a remedy, not a separate claim.

On appeal Gurvey argues that the District Court abused its discretion by (1) failing to adjudicate her April 2010 Rule 60(b) motion which, *inter alia*, sought leave to file a fourth amended complaint; (2) dismissing her claims against the defendants for misappropriation of her trade secrets, violation of the federal and state unfair competition and antitrust laws, tortious interference with her contractual and business relations, and attorney malpractice and breach of fiduciary duty; (3) not issuing a formal order with respect to the Cowan defendants' motion to compel arbitration and stay all proceedings pending arbitration; (4) failing to enter on the docket and adjudicate her requests to "reinstate" discovery; (5) granting Live Nation's and CCC's motions to dismiss for lack of personal jurisdiction; (6) finding that defendants did not engage in unfair competition by issuing false and misleading press releases; and (7) dismissing her claims against Cowan for ongoing malpractice and breach of fiduciary duty before the United States Patent and Trademark Office and for tortious interference with her contract with her previous employer, Legend Films.⁷ Gurvey has also moved to correct the record on appeal, requesting that we order the District Court to docket various documents she has unsuccessfully attempted to file with the District Court during the pendency of this appeal, including a record of a state arbitration proceeding and a motion filed pursuant to Fed. R. Civ. P. 60(b), and that we order the District Court to permit her to file a fourth amended complaint (which she has also unsuccessfully attempted to file with the court). The Cowan defendants have petitioned for fees and costs, requesting that Gurvey be required to pay their expenses associated with the defense of the instant appeal.

⁷ Gurvey also appeals from the District Court's denial of her motion for reconsideration of dismissal pursuant to Fed. R. Civ. P. 59(a). See *Gurvey*, No. 06 Civ. 1202, Docket No. 80 (S.D.N.Y. Sept. 20, 2010) (order denying motion to reconsider). In adjudicating Gurvey's Rule 59 motion, the District Court found that several of the arguments she made in her motion were newly raised. The court accordingly refused to consider those arguments. *Gurvey*, No. 06 Civ. 1202, Docket No. 80 (S.D.N.Y. Sept. 20, 2010) (order denying motion to reconsider); see *Nat'l Union Fire Ins. Co. of Pittsburgh v. Strub Cos., Inc.*, 265 F.3d 97, 115 (2d Cir. 2001) (noting that under Local Rule 6.3 of the Southern District of New York, a plaintiff may not raise a new argument for the first time in a motion for reconsideration). Because the arguments were not properly presented to the District Court, they are not before us now. See *Nat'l Union Fire Ins. Co.*, 265 F.3d at 115-16. To the extent the District Court rejected any earlier-raised arguments in its denial of Gurvey's motion for reconsideration, those arguments are addressed in tandem with, and subsumed by, our discussion of the court's dismissal of Gurvey's complaint on the merits.

DISCUSSION

We review *de novo* a dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6), “construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff’s favor.” *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). The complaint must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although all allegations contained in the complaint are assumed to be true, this tenet is “inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). A claim will have “facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

Having conducted an independent and *de novo* review of the record in light of these principles, and for substantially the reasons stated by the District Court in its thorough and well-reasoned opinion and order of April 2009, *Gurvey II*, 2009 WL 1117278, we affirm the judgment to the extent that it dismissed Gurvey’s claims for misappropriation of trade secrets, unfair competition, and tortious interference with contract as time-barred, and to the extent that it dismissed her claims for false advertising, violations of state and federal antitrust laws, and tortious interference with prospective economic relations, for failing to sufficiently plead claims upon which relief may be granted.

However, we vacate the District Court’s judgment to the extent that it dismissed Gurvey’s claims for attorney malpractice and breach of fiduciary duty against the Cowan defendants. Construing the TAC liberally, accepting all the factual allegations in the complaint as true, and drawing all reasonable inferences in Gurvey’s favor, *see Bell Atl. Corp.*, 550 U.S. at 570, we conclude that Gurvey stated a plausible claim by alleging that the defendants used the information given to them as part of a confidential attorney-client relationship to their own advantage by disclosing it to other clients who then

1 profited therefrom to Gurvey's detriment, *see Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*,
2 56 A.D.3d 1, 10 (1st Dep't 2008).⁸ We therefore remand the cause for further proceedings before the
3 District Court on these claims.

4 We deny Gurvey's motion to correct the record on appeal, having found that the documents she
5 asks this Court to consider either were not properly filed with the District Court or concern events that
6 occurred subsequent to the District Court's dismissal of her claims. *See generally* Fed. R. App. P. 10(e)
7 (setting forth procedure for correction of record on appeal). We also deny the request of the Cowan
8 defendants for an award of appellate costs and fees. *See* Fed. R. App. P. 38; *Schiff v. United States*, 919
9 F.2d 830, 834 (2d Cir. 1990).

10 We have reviewed Gurvey's remaining arguments and find them to be without merit.

11 CONCLUSION

12 For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED in part and
13 VACATED in part as specified above. The cause is REMANDED to the District Court for further
14 proceedings consistent with this order, including discovery on the remaining claims and any possible
15 dispositive motions that may thereafter ensue.

16
17 FOR THE COURT,
18 Catherine O'Hagan Wolfe, Clerk of Court
19

⁸ The plausibility of this argument is bolstered by Gurvey's allegation that Cowan withdrew from representing Gurvey before the United States Patent and Trademark Office due to what Cowan allegedly termed a "conflict of interest."

EXHIBIT 2

FILE COPY
CONFORMED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY R. GURVEY,

Plaintiff-Inventor *Pro se*,

Case No. 06 Civ. 1202
(LGS)(HBP)

v.

COWAN, LIEBOWITZ & LATMAN,
PC, WILLIAM BORCHARD, MIDGE
HYMAN, CHRISTOPHER JENSEN,
SIMON GERSON, R. LEWIS
GABLE, MARK MONTAGUE, AND
BAILA CELEDONIA, ET AL.,
(Collectively "Cowan defendants").

**PLAINTIFF PRO SE'S
NOTICE OF MOTION TO
REMAND TO SUPREME
COURT OF NY, NY COUNTY**

Defendants.

PLEASE TAKE NOTICE that on the 19th day of March, 2014 at 9:30 a.m. in the forenoon of that day or as soon thereafter as the parties may be heard, Plaintiff *pro se* Amy R. Weissbrod Gurvey, a USPTO inventor, will move this Court for an order remanding the instant lawsuit to Supreme Court of NY, NY County, on the grounds that:

(1) There has been a change in the relevant law that pertains to the District Court's continuing jurisdiction because there are no remaining issues in Plaintiff's 3AC that require resolution of a substantial issue of federal patent law. [*Gunn v. Minton*, 133 S. Ct. 1059 (USSC Tex. 2013) (Roberts, J.)];

(2) Per the District Magistrate's order of February 25, 2014, discovery in this lawsuit has just begun after eight years such that as a matter of law, the case is in its embryonic stages, and there can be no possible prejudice to Cowan defendants if remand is granted;

(3) There is a related lawsuit pending before Supreme Court of NY, NY County (Index No. 13/600012, Gurvey v. Squitieri & Fearon LLP ("S&F")) with overwhelming issues common to the instant lawsuit that pertain to Cowan defendants' fraud and purging Plaintiff's files from e-directories in 2002-3 that pertain to secret patent services performed by Cowan for Legend Films and its officers and a possible conspiracy to steal Plaintiff's inventions. Because each of Cowan and S&F breached Plaintiff's attorney client privilege in Legend matters, and S&F was induced by Cowan's fraud and withholding files, the two cases should be consolidated in the interests of justice, judicial economy, and to prevent inconsistent judgments and any further prejudice to Plaintiff;

(4) Original 3AC defendants Clear Channel, Live Nation and Michael Gordon of Phish, who were Cowan clients to whom misappropriation of Plaintiff's patented inventions occurred in 2002-3, have all been dismissed by the District Court (462 Fed. Appx. 26, fn 5) (2d Cir. Feb 10, 2012)(As to Gordon and Schick, S&F did not properly serve these new individual defendants with the 3AC);

(5) Sherman antitrust claims against former defendants Clear Channel and Live Nation pleaded by S&F were also dismissed by order the District Court such that there is no independent basis for exclusive federal jurisdiction;

(6) Because of the Court's dismissal orders, Plaintiff's original intentions are frustrated, i.e., she cannot now recover infringement damages Cowan clients in the current lawsuit in spite of issued US patent claims; ergo there is no issue requiring resolution of a substantial issue of federal patent law before this Court;

(7) Cowan defendants' withholding of all patent legal services for Plaintiff for close to 6 months after retainer in December 2001, breach of fiduciary duty, failure to file for expedited prosecution of Plaintiff's long form patent draft, failure to file a PCT and prevent US publication and failure to qualify prior art, and failure to perfect provisional after filing operated to waive

Plaintiff's prosecution benefits that belong with the first applications in a portfolio; and are all state claims;

(8) That Plaintiff's inventions were held to be novel and patentable means that had Cowan performed according to standard care, claims should have issued to Plaintiff in 2004-5 and Plaintiff's damages are lost patent royalties, customization contracts and retainers backlogged for the last ten years;

(9) That Cowan also failed to prevent US publication of Plaintiff's disclosures allowed Apple to copy Plaintiff's delayed published applications and compete with Plaintiff for patents on her inventions, demonstrating further damages and exorbitant patent legal fees;

(10) Although Plaintiff has since been awarded two issued US patents based on Cowan's December, 2001 retainer, Plaintiff still has 17 patent applications in delayed, languished prosecution in the US and Europe and not enough issued US claims from the portfolio to commence infringement lawsuits against Cowan clients, Apple and others;

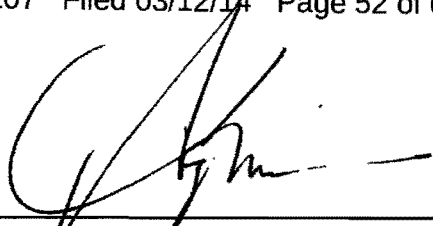
(11) The only remaining ground for federal jurisdiction is diversity of citizenship between Cowan's NY headquarters and Plaintiff's NJ residence;

(12) There are additional issues of state concern including whether Hinshaw & Culbertson, who sat on the disciplinary committee in NYS and ignored Plaintiff's grievances and the grievances of other inventors, may have to be disqualified from Cowan's representation based on their own conflicts;

(13) The Court's order to Plaintiff to revise previously submitted preliminary Rule 26(a) disclosures and retain patent damages expert witnesses without the benefit of Cowan's discovery, without the Court ever compelling return of Plaintiff's files from S&F and from her patent attorneys post Cowan, is oppressive; and

(14) Because Plaintiff is permanently disabled as defined under the Americans With Disabilities Act ("ADA"), and continues to attempt to prosecute the remaining patents to mitigate damages with limited funds, the Court should, in the interests of justice, take these mitigating factors into account and remand to the state where litigation is less expensive.

Dated: February 28, 2014
Montclair, NJ



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY R. GURVEY,

Plaintiff-Inventor *Pro se*,

Case No. 06 Civ. 1202
(LGS)(HBP)

v.

COWAN, LIEBOWITZ & LATMAN,
PC, WILLIAM BORCHARD, MIDGE
HYMAN, CHRISTOPHER JENSEN,
SIMON GERSON, R. LEWIS
GABLE, MARK MONTAGUE, AND
BAILA CELEDONIA, ET AL.,
(collectively "Cowan defendants").

**PLAINTIFF PRO SE'S
DECLARATION IN SUPPORT
MOTION TO REMAND TO
SUPREME COURT OF NY,
NY COUNTY**

Defendants.

Plaintiff pro se Amy R. Weissbrod Gurvey makes this declaration and swears to the truth of the following statements under penalty of perjury in support of her annexed motion of even date, returnable March 19, 2014 at 9:30 am in the forenoon of that day, seeking to remand the current lawsuit to the Supreme Court of NY, NY County.

1. This lawsuit was commenced by summons and complaint on February 15, 2006 seeking damages, *inter alia*, for fraud, patent malpractice, breach of fiduciary duty, antitrust, unfair competition and misappropriation of Plaintiff's inventions which are now the subject of two issued US patents as of October 13, 2009 and November 1, 2011¹. Plaintiff's first US patent claims issued during the stay of appeal ordered by Second Circuit. Seventeen patent

¹ Gurvey US Patent Nos. 7, 603,321 (October 13, 2009); D610947S (November 1, 2011)

applications from the portfolio remain pending in the US and European patent offices.

2. Original defendants were intellectual property firm Cowan Liebowitz & Latman, PC, and its clients Clear Channel Communications, Inc., Clear Channel Entertainment, Inc. Spinco that in 2005 became Live Nation, Inc. (the leading concert promoter and venue owner in the United States), Phish, and newly-formed Clear Channel subsidiaries, Instant Live Concerts, LLC and Next Ticketing, Inc. Subsidiary defendants were immediately dissolved as soon as Plaintiff's first US patents issued during the stay of appeal ordered by Second Circuit and Plaintiff's opening brief had been filed at the Second Circuit in August, 2011.

3. A cause of action for patent attorney malpractice accrues when the Plaintiff-inventor is noticed by a patent office of lost and/or forfeited patent claims attributable to the defendant attorney's retainer, breach of fiduciary duty or breach of the standard of care for patent attorneys. Protostorm v. Antonelli, Terry, Strout, et al., 834 F. Supp. 2d 1441 (EDNY 2011). As to Plaintiff, notice of lost claims occurred on October 13, 2009.

4. Cowan was retained by Plaintiff for patent services in December, 2001 including inter alia to edit and file a formal version of Plaintiff's long form draft application that included specifications, figures, drawings, schematics and draft claims in mobile ticketing, premium performance ticketing and digital editing and conversion systems that package and distribute event and broadcast content in real time for direct, legal transmission to electronic devices.

5. Sherman antitrust claims were pleaded by Plaintiff's attorneys Squitieri & Fearon, LLP ("S&F") against Clear Channel and Live Nation because in 2005 Live Nation acquired a master CD recording patent, Griner and upon acquisition, issued false and misleading press releases that it (Live nation) thereby owned a monopoly on distributing live concert recordings. Live Nation that acquired Instant Live Concerts, then used its acquisition of Griner in bad faith to preclude other recording firms from entering its venues to record concerts for featured artists.

6. In 2007 the Electronic Frontier Foundation moved before the USPTO to invalidate the Griner patent based on non-utility, and that CD burning was then at 52X, and won that proceeding, leaving Plaintiff with the

only remaining premium ticketing and content editing patents that control digital of event and broadcast distribution, then pending.

7. Plaintiff, having discovered that many NY area firms had conflicts of interest with defendants, its clients and its defense firm, was able to retain S&F because S&F had sued Clear Channel in a ticketing antitrust lawsuit before SDNY in 2006, and acquired jurisdiction over defendant based on its ownership of 145 concert venues in the tri-state area. The same allegations were pleaded by S&F in Plaintiff's 3AC but the District Court found there was no jurisdiction in order of March 17, 2009; and eight times referred to Plaintiff's inventions as "business plans". Business plans don't qualify for patents under 35 USC 101 et seq. S&F then failed to file a notice of appeal to the order dismissing Clear Channel and Live Nation, divesting Second Circuit of jurisdiction to hear Plaintiff's appeal on what were blatantly false jurisdictional papers. This dismissal frustrated para. 18 of Plaintiff's 3AC that stated that if patent claims issued to Plaintiff during the pendency of this lawsuit that Plaintiff could amend and be able to recover damages and infringement damages in this same lawsuit. The dismissal of Clear Channel and Live Nation prevented recovery of infringement damages.

8. When this lawsuit went on appeal, Plaintiff still had no issued US patents; and only knew of unlawful outsourcing of her inventions by Cowan clients including another client, MLB Advanced Media. A 6-column article published in the New York Times Business Section on Monday, May 5, 2003 by Matthew Mirapol, quoted terms of art from Plaintiff's unpublished provisional patent applications filed by Cowan on May 22 and 24, 2002 respectively. Such terms included "to capture otherwise lost live content". In addition, members of Phish were interviewed in the article. The New York Times is upon belief also a Cowan trademark client; and Cowan emails provide additional evidence of misappropriation of Plaintiff's inventions during 2002 by partners of the firm and a senior associate, Susan Schick, then engaged to and now married to Phish's bass guitarist, Michael Gordon.

9. Had Plaintiff not filed suit in 2006, the statute of limitations on legal malpractice and breach of fiduciary duty claims would have lapsed. This is the unfortunate fate of many inventors who need legal counsel. The USPTO confirmed Cowan's retainer until September, 2003.

10. The State of NY did not help Plaintiff resolve her dispute with Cowan and it has not helped other inventors, which is against its interest in

creating new technology jobs. Plaintiff previously filed grievances against Cowan defendants starting in 2004 and attempted to get back her converted funds. FDDC ignored Plaintiff's grievances and those of other inventors; and another inventor, Eliot Bernstein, filed suit before this Court for State's failure to cite Proskauer attorneys for proceeding on his patent applications in the face of what he contended were significant conflicts. NY proscribes retainer with even a scintilla of conflict.

11. Upon belief, an inventor has never been awarded damages for patent malpractice before this tribunal, even when the attorney did not disclose per se conflicts of interests.

12. The additional issue making it hard to obtain recovery is that to recover damages for patent malpractice an inventor-plaintiff must show that but for the attorneys' malpractice, a patent would have issued. Plaintiff can meet this standard because Plaintiff was issued two US patents and is missing claims emanating from Cowan's misconduct. Bernstein, could not.

13. Other inventors such as Cold Spring Harbor Laboratories in East Islip also did not get assistance from NYS in investigating conflicts and alleged fraud by Ropes & Gray. Because Ropes and Gray has offices out of NY, the inventors were able to transfer their suit to the D. Mass and the State of Massachusetts also assisted them. Cold Spring Harbor Laboratories v. Ropes & Gray and Matthew Vincent, 840 F. Supp. 2d 473 (D. Mass 2012)(Transferred from EDNY). The failure of NYS to assist inventors propagates misconduct by patent attorneys; many take retainers, don't do the work and don't refund the inventor's money.

14. Cowan defendants were retained by Plaintiff in December, 2001 and accepted a \$50,000 retainer from Plaintiff; but performed no services at all on Plaintiff's long form patent drafts for close to six months, i.e., until May 22 and 24, 2002. On these dates, Cowan defendants R. Lewis Gable and Mark Montague - after consulting with Cowan management partners and getting their permission - finally submitted two synopses of Plaintiff's inventions to the USPTO in two provisional patent applications. (Appl. Nos. 60/382,710; 60/382,949). Plaintiff did not hire Cowan to file provisional synopses; and its partners forced Plaintiff to disclose her inventions at a February 2002 partners' meeting; and did nothing to protect Plaintiff's inventions even then.

15. Cowan then did not perform any follow-up services commensurate with the retainer or ever file the formal applications for Plaintiff. The provisionals do disclose Plaintiff's inventions in mobile ticketing, premium performance ticketing that use stored information exchanged during ticketing and subscriptions to authenticate sales and enable other businesses; and in digital editing and conversion of live event and broadcast content (analog and digital).

16. Cowan defendants allegedly attempted to withdraw from one of the two applications at the USPTO in 2003, without ever serving Plaintiff with that notice. That notice admitted to a "conflict of interest" as the grounds. This is not disputed. There is no proof of service on the USPTO records, and Cowan is listed as Plaintiff's patent attorney of record until September, 2003. Cowan never disclosed the source and nature of its admitted conflict to Plaintiff; and never withdrew from the second application.

17. Throughout this litigation Cowan and its attorney Richard Supple, Esq. have blatantly lied that the admitted "conflict" stated in the USPTO withdrawal related to Cowan's failure to pay Plaintiff monies owed.

18. During the period of Cowan's patent retainer, however, the NY Times article was published; Plaintiff contacted Cowan attorneys and was threatened by the firm. The article is evidence that Plaintiff's inventions were given to its other defendant clients and that Cowan used confidential information obtained during the attorney client relationship to benefit itself and its other clients. This is the holding of the Second Circuit.

19. Cowan had also entered into a separate agreement for Plaintiff to perform business development services through December, 2002 because it was interested in her technology acumen and clients. That separate contract was breached three weeks after execution by Cowan defendant William Borchard on April 17, 2002 as found by SDNY Arbitrator including Borchard's separate execution of a rider on the same date. Both documents have Cowan's date stamp. After eight years, arbitration was the only evidentiary hearing in the entire lawsuit.

20. The SDNY arbitration award entered on August 4, 2009 was in Plaintiff's favor on all counts and remains missing from the SDNY docket in spite of Plaintiff's applications to Magistrate; Arbitrator did not, however, adjudicate Cowan's breach of Plaintiff's patent service retainer.

21. To date, after the Court ignored multiple of Plaintiff's applications, the Court has still failed to enter Plaintiff's 4AC and Rule 60(b) motion papers filed and date stamped by SDNY Cashier on April 22, 2010.

22. There still has been no adjudication by this Court after 8 years of Cowan's breach of Plaintiff's patent service retainer; and no discovery was permitted in favor of Plaintiff before remand from the Second Circuit.

23. On April 16, 2012, Judge Barbara Jones finally ordered a discovery conference to set a schedule; that hearing was adjourned twice. About the same time, Supple moved again ex parte for authorization to answer Plaintiff's 3AC ; and Judge Jones granted that application the same day without ever allowing Plaintiff time to oppose. Plaintiff's 4AC already served two years prior based on USPTO notice of actual injury to Plaintiff's issued US patent and lost claims. The brief on these issues was before Magistrate but mention is missing from the February 24, 2014 order. Protostorm v. Antonelli, Terry, Stout, et al., 834 F. Supp. 2d 141 (EDNY 2011)

24. At a previous 2012 conference, Supple, having had all his sanctions orders to date denied by Arbitrator and Second Circuit, reframed them for the new Court and lied. This is prejudicial to Plaintiff. He falsely contended that he never got the 4AC served during the stay of appeal when in fact he answered it. The 5AC served by Plaintiff is virtually identical; and was served prior to Cowan's first document production in December, 2012, demonstrating that additional amendments may be warranted.

25. Magistrate then requested the parties to serve preliminary Rule 26 (a) disclosures. Plaintiff submitted hers timely although she was in forced evacuation during Hurricane Sandy. Supple did not submit his until late in December, and they were incomplete.

26. The CD Supple produced in December, 2012 included several of the emails previously purged from Plaintiff's edirectories by Cowan in 2003, as alleged in Plaintiff's complaint.

27. From this discovery, the case has changed.

28. It took ten years after the fact for Plaintiff to be able to discover that on May 6, 2002, the day before Cowan breached Plaintiff service contract

without cause as found by Arbitrator, Cowan had secretly and unlawfully inserted Plaintiff's digital conversion inventions, ideas and trade secrets into a PCT patent application filed for another client, Barry Sandrew, then COO of Legend Films, LLC. Sandrew's PCT was filed by Cowan defendant R. Lewis Gable, and then the next day when terminating Plaintiff, Cowan defendants fraudulently misrepresented to Plaintiff that no patent work had yet be done for Legend of its officers. Cowan defendants Borchard, Gerson and Peter Porcino in fact told Plaintiff no work was done because they had no retainer with Legend or Sandrew and Legend had not paid any retainer funds. The misrepresentation that no patent was yet done for Legend and its officers was blatantly untruthful.

29. From Cowan's first discovery in December 2012, Plaintiff also learned that Sandrew had used an outside patent attorney to file his first digital black-and-white film masking provisional application on May 4, 2001 and had stolen and integrated Plaintiff's ideas to convert Sandrew's previous analog patent applications to digital.

30. Cowan expressly knew from Legend's 2001 prospectus that Plaintiff had been listed as General Counsel of Legend in May, 2001; but secretly learned from Sandrew that he, Sandrew, had used outside corporate counsel to file the articles of organization in Nevada in August 2001 and issue stock certificates; and that Plaintiff, as General Counsel, was not informed.

31. According to Cowan's previously concealed, purged emails, Cowan attorneys were given Sandrew's concealed provisional patent application filed on May 4, 2001 (60/288,929) and were instructed to perfect the provisional into a PCT for Sandrew and purge all the relevant files from Plaintiff's emails. Cowan, knowing of Plaintiff's inventions in digital editing and conversion, did not list Plaintiff as co-inventor of that disclosure.

32. Cowan, also knowing or having a presumption of Sandrew's patent theft and conflict, nonetheless assigned Sandrew's filed PCT to Legend Films, LLC the same day and again did not inform Plaintiff.

33. Per the emails produced in December, 2012, Cowan admittedly "followed its client's instructions" in concealing the patent work from Plaintiff, and purging the relevant files from Plaintiff's edirectories, resulting in a USPTO investigation.

34. Legend Films then still without informing Plaintiff, terminated Cowan's retainer and retained a San Diego firm, Procopio et al., to finish patent prosecution of the Sandrew PCT plus a corresponding formal US application. These applications resulted in a patent to Legend in 2007 incorporating an application of Plaintiff's digital editing and conversion inventions that were missing from Plaintiff's October 13, 2009 issued US patent claims.

35. The original cover letter from Cowan defendant R. Lewis Gable to Procopio in 2004 did not include a "cc: Amy Gurvey"; but the corresponding document produced by Cowan in discovery in 2012 somehow did, demonstrating that Cowan had doctored patent evidence to create a self-serving photocopy.

36. This is not the first time Cowan defendants and their attorneys doctored evidence.

37. At the commencement of this lawsuit in July, 2006, Supple frivolously moved to stay discovery and compel arbitration based on Cowan defendant Simon Gerson's sworn affidavit that what was appended was Plaintiff's complete of counsel contract. The signed, date-stamped rider to that contract was omitted. Arbitrator found both the original rider and contract had date stamps of April 17, 2002. The rider to Plaintiff contracts reserved 3% vested in Legend stock at founder's level.

38. A unilaterally forged version of the rider was then sent by each of Cowan defendants and by S&F to Legend's attorneys in California, having a new date stamp of May 8, 2002. This demonstrates a further breach of Plaintiff's attorney client privilege by two attorneys, Cowan defendants and S&F. The new date is also self-serving, i.e., after the date of Plaintiff's termination by Cowan. Legend in turn used that rider in litigation to get out of paying Plaintiff her stock and moving for summary judgment on contract claims; however, because Plaintiff was denied discovery in the Legend lawsuit and Cowan's first discovery was produced after Legend was granted summary judgment, Plaintiff never knew of the conspiracy between Legend and Cowan to commit patent theft; and was denied the knowledge to litigate these claims against Legend.

For Opinion See [2010-2 Trade Cases P 77113](#)

United States District Court, District of Columbia.
UNITED STATES OF AMERICA, et al., Plaintiffs,
v.
TICKETMASTER ENTERTAINMENT, INC. and Live Nation, Inc., Defendants.
No. 110-cv-00139.
January 25, 2010.

Assign. Date: 1/25/2010

Description: Antitrust

Competitive Impact Statement

[Aaron D. Hoag](#), Attorney, U.S. Department of Justice, Antitrust Division, 450 Fifth Street, N.W., Suite 4000, Washington D.C 20530, Telephone: (202) 514-5038, Fax: (202) 514-7308, Email: aaron.hoag@usdoj.gov.

Assigned to: [Collyer](#), Rosemary M.

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), [15 U.S.C. § 16\(b\)-\(h\)](#), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

Defendant Ticketmaster Entertainment, Inc. ("Ticketmaster") and Defendant Live Nation, Inc. ("Live Nation") entered into an agreement, dated February 10, 2009, pursuant to which they would merge into a new entity to be known as Live Nation Entertainment. The United States, and the States of Arizona, Arkansas, California, Florida, Illinois, Iowa, Louisiana, Nebraska, Nevada, Ohio, Oregon, Rhode Island, Tennessee, Texas, and Wisconsin, and the Commonwealths of Massachusetts and Pennsylvania filed a civil antitrust Complaint on January 25, 2010, seeking to enjoin the proposed transaction because its likely effect would be to lessen competition substantially for primary ticketing services to major concert venues located in the United States in violation of Section 7 of the Clayton Act, [15 U.S.C. § 18](#). This loss of competition likely would result in higher prices for and less innovation in primary ticketing services.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to grant a perpetual license to their Host platform and to divest their entire Paciolan business in order to establish two independent ticketing companies capable of competing effectively with the merged entity. The Final Judgment also prohibits Defendants from engaging in certain conduct that would prevent equally efficient firms from competing effectively. Under the terms of the Hold Separate, Ticketmaster will take certain steps to ensure that the Paciolan business is operated as a competitively independent, economically viable and ongoing business concern that will remain independent and uninfluenced by the consummation of the transaction and to ensure that competition is maintained during the pendency of the ordered divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish and remedy violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Concert Industry

Staging concerts traditionally has required the participation of several parties. **Artists** provide the entertainment that makes the concert possible. **Managers** and/or **agents** represent artists in negotiations to establish the commercial terms on which artists will perform. Promoters contract with artists to perform at particular concerts, assume the financial risk of staging the concerts, make the arrangements for the concerts to occur at certain times and places, and market the concerts. **Venues** are the physical locations where concerts occur, and venues' owners, operators, or managers usually arrange for the sale of tickets to concerts at their venues. **Primary ticketing companies** provide services - such as websites, call centers, and retail networks from which tickets may be purchased - that facilitate the initial sale of tickets to concertgoers.^[FN1]

FN1. After their initial sale, concert tickets may be resold on the secondary ticketing market. *Ticket brokers* purchase tickets with the intention of reselling them to concertgoers. *Secondary ticketing companies* provide services that facilitate the resale of tickets to concertgoers by ticket brokers and others.

Contracts between venues and primary ticketing companies are individually negotiated. In a typical contract, a venue agrees to use one primary ticketing company as its exclusive service provider for several years. In exchange, the primary ticketing company often agrees to pay to the venue a portion of the fees that the primary ticketing company charges to concertgoers who purchase tickets to events at the venue. The primary ticketing company also may agree to pay an up-front bonus or advance upon execution of the contract. Primary ticketing contracts typically prohibit venues from reselling the primary ticketing services they receive.

B. The Defendants and the Proposed Transaction

Ticketmaster is the largest primary ticketing company in the United States. In 2008, Ticketmaster earned gross revenues of about \$800 million from its U.S. primary ticketing business. Ticketmaster offers two principal primary ticketing products to venues: (1) Host, a Ticketmaster-managed platform for selling tickets through Ticketmaster's website and other sales channels; and (2) Paciolan, a venue-managed platform for selling tickets through the venue's own website and other sales channels. In 2008, Ticketmaster provided primary ticketing services to venues representing more than 80% of major concert venues.^[FN2] In addition to its primary ticketing operations, Ticketmaster expanded into the artist management business in 2008 by acquiring a controlling interest in Front Line Management Group Inc. ("Front Line"), an important artist management firm with clients such as the Eagles, Neil Diamond, Jimmy Buffett, Christina Aguilera and John Mayer.

FN2. While the conclusions reached in the antitrust analysis described below are not sensitive to the precise number of venues included within this class, for purposes of this Competitive Impact Statement, "major concert venues" are the 500 U.S. venues generating the greatest concert revenues in 2008, as reported in Pollstar, a leading source of concert industry information. Concert ticket revenues from events at these venues represent more than 90% of the concert ticket revenues at all venues reported in Pollstar. Major concert venues are a diverse group, which includes large stadiums and arenas with relatively few concerts (e.g., the Verizon Center in Washington, DC), mid-sized amphitheaters that host concerts regularly during certain seasons (e.g., Nissan Pavilion in Bristow, VA), and smaller clubs and theaters with frequent concerts

throughout the year (*e.g.*, Warner Theatre in Washington, DC and Live Nation's House of Blues clubs). To account for this diversity, venues are weighted by their capacity in calculating shares of the market for primary ticketing services to major concert venues. Only public sources of information were used to calculate the market shares described in this Competitive Impact Statement

Live Nation is the largest concert promoter in the United States, earning more than \$1.3 billion in revenue from its U.S. promotions business in 2008 and promoting shows representing 33% of the concert revenues at major concert venues in 2008. Live Nation has entered long-term partnerships with several popular artists - including Madonna and Jay-Z - to exclusively promote their concerts, sell recordings of their music, and market artist-branded merchandise such as T-shirts. Live Nation also owns or operates about 70 major concert venues throughout the United States. And as explained further below, Live Nation entered the market for primary ticketing services in late December 2008.

On February 10, 2009, less than two months after its entry into primary ticketing, Live Nation agreed to merge with Ticketmaster. That proposed transaction would substantially lessen competition and is the subject of the Complaint and proposed Final Judgment filed by the United States in this matter.

C. The Market for Primary Ticketing Services to Major Concert Venues in the United States

Antitrust law, including Section 7 of the Clayton Act, protects consumers from anticompetitive conduct, such as firms' acquisition of the ability to raise prices above levels that would prevail in a competitive market. Market definition assists antitrust analysis by focusing attention on the relevant portions of the economy where competitive effects are likely to be felt. Well-defined markets encompass the economic actors - including both sellers and buyers whose conduct most strongly influences the nature and magnitude of competitive effects. To ensure that antitrust analysis takes account of a broad enough set of products to evaluate whether a transaction is likely to lead to a substantial lessening of competition, defining relevant markets in horizontal merger cases frequently begins by identifying a collection of products or set of services over which a hypothetical monopolist profitably could impose a small but significant and non-transitory increase in price. Here, the United States's investigation revealed that major concert venues would have no alternatives to primary ticketing services if prices were to rise significantly above the levels that would have prevailed but for the proposed transaction, so the hypothetical-monopolist test would exclude all other products or services from the relevant market. But that is not the end of the market-definition exercise.

When sellers are unable to set different terms of sale for different buyers, all buyers will face similar competitive effects, and a relevant product market properly (if implicitly) encompasses not only all sellers of the relevant product, but all buyers as well. But when different buyers may experience different competitive effects, a well-defined product market encompassing fewer than all buyers can focus antitrust analysis appropriately on those buyers most vulnerable to suffering probable and significant competitive harm. It also avoids conflating in that analysis those buyers whose prices are likely to be significantly affected with others who are unlikely to be harmed substantially.

One situation in which different buyers experience different effects involves price discrimination, such as when sellers are able to charge different prices to different buyers for equivalent products. Sellers can price discriminate when they are able to identify and target vulnerable buyers for price increases and when buyers facing low prices cannot resell to those facing higher prices. Both conditions are present here. Venues and primary ticketing companies individually negotiate their contracts, and the terms of those contracts typically make it impossible for venues to resell (arbitrage) primary ticketing services.

Because primary ticketing companies can price discriminate among different venues, the proposed transaction could affect different classes of venues differently, and antitrust analysis requires attention to those venues with few alternative primary ticketing providers to Ticketmaster and Live Nation because, if the proposed transaction were consummated, their real-world choices would be reduced differently than would be other venues' options.

Major concert venues require more sophisticated primary ticketing services than other venues, so each tends to select a primary ticketing company with an established reputation for providing good service to similar venues. Ticketmaster has shown that its primary ticketing platform is able to withstand the heavy transaction volume associated with the first hours when tickets to popular concerts become available to concertgoers (“high-volume on-sales”), offer integrated marketing capabilities, and otherwise provides proven, high-quality service to venues. When the proposed transaction was announced, Live Nation was building experience selling tickets to concerts at its own venues as a way to demonstrate to other venues that its primary ticketing platform also performed well. No primary ticketing company other than Ticketmaster and Live Nation has amassed or likely could have amassed in the near term sufficient scale to develop a reputation for successfully delivering similarly sophisticated primary ticketing services. Additionally, Live Nation planned to compete for primary ticketing contracts with major concert venues, but had less interest in serving non-concert venues outside its historically core concert expertise. Because they would have no equally attractive alternative primary ticketing provider to the merged firm, and because they would have benefited more from competition between Ticketmaster and Live Nation, major concert venues are more vulnerable than smaller venues to anticompetitive harms caused by the proposed transaction, and a well-defined relevant market should not encompass customers other than major concert venues. For example, a high school that hires a student to sell tickets to one of its musical productions could be said to be buying “primary ticketing services,” but the relevant market can exclude such other venues because there is no significant risk that sales to them would affect Defendants’ ability to exercise market power over major concert venues.

Antitrust analysis also must consider the geographic dimensions of competition. Section 7 protects against harm to competition “in any section of the country.” [15 U.S.C. § 18](#). Here, domestic anticompetitive harms would be experienced by major concert venues located throughout the United States. Because the merged firm could price disiminate, any effects of the proposed transaction on foreign venues would be distinct from any effects on domestic venues. Thus, including only major concert venues located in the United States within the relevant market poses no risk of omitting buyers whose inclusion would significantly alter the antitrust analysis.^[FN3]

FN3. In this case, there are not significant transportation costs associated with the relevant services, so sellers’ locations do little to inform the market-definition inquiry, though they are not irrelevant to antitrust analysis. To the contrary, only sellers capable of serving major concert venues located in the United States can compete with Defendants in the relevant market. Many of those sellers are located within the United States, but some are foreign firms, as suggested by Live Nation adaptation of a European primary ticketing platform for use in the United States, which is discussed below. Foreign sellers historically have not competed effectively in the United States because of the significant investments required to enter the domestic market. Still, Live Nation’s example suggests that, with a significant investment of time and money, foreign primary ticketing companies might be capable of adapting their products for U.S. customers.

In short, the sale of primary ticketing services to major concert venues in the United States is a well-defined relevant market for the purpose of analyzing the effects of the proposed transaction.

D. The Competitive Effects of the Proposed Transaction

Until 2009, Ticketmaster dominated the market for primary ticketing services to major concert venues in the United States with greater than 80% market share. The only other primary ticketing companies with greater than a 1% share in 2008 were Tickets.com (4%), Front Gate Tickets (3%), New Era Tickets (2%), Live Nation (2%),^[FN4] and Tessitura (1%). Ticketmaster’s largest customer for primary ticketing services was Live Nation, the owner or operator of venues representing about 15% of capacity at all major concert venues in the United States in 2008. Ticketmaster renews its primary ticketing contracts at a very high rate. Even though Ticketmaster’s distribution costs have declined dramatically as concertgoers have shifted their purchases toward the internet and away from traditional sales channels, the ticketing fees retained by Ticketmaster have not fallen, and Ticketmaster has continued to enjoy large profit margins on its primary ticketing business for many years.

These margins have persisted because they are protected by high barriers to other companies successfully, substantially, and profitably entering or attempting to expand in the market for primary ticketing services to major concert venues. First, the platforms required to provide primary ticketing services to major concert venues are technologically complicated and expensive to develop and deploy. Second, major concert venues are reluctant to enter long-term exclusive contracts with new primary ticketing companies because they lack Ticketmaster's established reputation for capably handling high-volume on-sales and providing high-quality service to venues. Third, the costs of installing and training employees to use new equipment make it expensive for venues to switch between primary ticketing companies. Fourth, because there are high fixed costs to develop and maintain a primary ticketing platform, entrants struggle to obtain sufficient scale to compete successfully with Ticketmaster on price. Fifth, Ticketmaster's scale provides another important incumbent advantage over other firms- extensive data about individual concertgoers collected over many years. Ticketmaster can use that data as a powerful marketing tool to secure venue contracts for primary ticketing services. Sixth, Ticketmaster's practice of signing long-term exclusive contracts with venues limits how quickly other firms can amass sufficient scale to compete effectively with Ticketmaster on any of these dimensions.

FN4. Before 2009, by virtue as its position as a promoter, Live Nation received roughly 10% of the tickets to concerts it promoted, and it sold those tickets to concertgoers through its MusicToday subsidiary and a platform licensed from eTix. Live Nation also used the MusicToday platform to provide primary ticketing services to a few small venues.

By 2008, Ticketmaster's longstanding dominance faced a major threat. Live Nation was better positioned to overcome the entry barriers discussed above than any other existing or potential competitor because it could achieve sufficient scale to compete effectively with Ticketmaster simply by ticketing its own venues. Live Nation also possessed a unique competitive advantage in that it could bundle access to important concerts with its ticketing service. Recognizing Live Nation's potential to disrupt its dominant position in the market for primary ticketing services, Ticketmaster attempted to renew Live Nation's primary ticketing contract before its December 31, 2008 expiration. But Live Nation instead chose to license technology from CTS Eventim AG ("CTS") that would enable it to sell concert tickets to its own venues beginning in 2009 and to compete with Ticketmaster for other venues' primary ticketing contracts in the future.

This competition began even before Live Nation's contract with Ticketmaster expired. On September 11, 2008, Live Nation announced that SMG - the largest venue management company in the United States, with the ability to control or influence the selection of primary ticketing companies at more than 40 major concert venues - had agreed to use Live Nation's primary ticketing services, if Live Nation could provide a primary ticketing platform comparable to other leading primary ticketing companies. SMG was Ticketmaster's third largest customer (behind only Live Nation and Anschutz Entertainment Group, Inc.), but it switched to Live Nation because SMG expected that, if it used Live Nation's primary ticketing services, Live Nation would use its strength in promotions to bring more concerts to SMG-managed venues. On October 14, 2008, Live Nation announced that it would provide primary ticketing services to New York City's Roseland Ballroom, another former Ticketmaster client. By 2009, Live Nation provided primary ticketing services to more than 15% of the capacity at major concert venues in the United States.

Ticketmaster responded to competition from Live Nation in several ways. First, it offered more attractive renewal terms to customers with expiring contracts than it had customarily offered in order to lock customers into long-term deals before Live Nation could sign them. Second, Ticketmaster acquired a controlling interest in Front Line on October 23, 2008. Front Line's strength in artist management enabled Ticketmaster for the first time to offer venues a package of primary ticketing services and concert content that could rival Live Nation's ticketing-and-content package. Finally, Ticketmaster moved to eliminate Live Nation entirely as a competitor by agreeing to the proposed transaction less than two months after Live Nation began ticketing with the CTS platform.

The proposed transaction would extinguish competition between Ticketmaster and Live Nation and thereby eliminate the financial benefits that venues enjoyed during the brief period when Live Nation was poised to challenge Ticketmaster's dominance. The proposed transaction would also diminish innovation in primary ticketing services because

the merged firm would have reduced incentives to develop new features. Further, the proposed transaction would result in even higher barriers to entry and expansion in the market for primary ticketing services. In addition to the long-standing entry barriers discussed above, the merged firm's ability to bundle primary ticketing services (implicitly or explicitly) with access to artists managed by Front Line and/or promoted by Live Nation would require competitors to offer venues both primary ticketing services and access to content in order to compete most effectively.

Defendants have asserted that the proposed transaction will generate efficiencies sufficient to counteract any anti-competitive effects. More specifically, they have contended that the vertical integration of Ticketmaster and Live Nation's complementary businesses will reduce the number of industry participants who currently must be compensated for a concert to be produced and, thus, will allow the merged entity to reduce the prices paid by venues for primary ticketing services and by concertgoers for tickets. While appreciating that vertical integration may benefit consumers in some situations, the United States does not fully credit Defendants' efficiency claims because they each could realize many of the asserted efficiencies without consummating the proposed transaction. Ticketmaster and Live Nation each already had expanded vertically before they agreed to the proposed transaction, and but for the proposed transaction, venues and concertgoers would have continued to enjoy the benefits of competition between two vertically integrated competitors. A vertically integrated monopoly is less likely to spur innovation and efficiency than competition between vertically integrated firms, and a vertically integrated monopoly is unlikely to pass the benefits of innovation and efficiency onto consumers.

Defendants also contended that Live Nation's impact on ticketing would be minimal because of shortcomings in Live Nation's ticketing platform, including the absence of a season ticketing component, which is important for a number of venues. Though the CTS platform was originally designed for use in Europe, Live Nation and CTS have invested heavily to adapt it for use in the United States. In the first six months of 2009, Live Nation used the CTS platform to sell more than 6 million tickets to concerts at its U.S. venues. Before entering the proposed transaction, Live Nation had planned to continue improving the CTS platform, including developing a season ticketing component, to make it more attractive to potential third-party venue clients in the United States.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment will eliminate the anticompetitive effects of the proposed transaction in the market for primary ticketing services to major concert venues in four principal ways.

First, the Final Judgment will enable Anschutz Entertainment Group, Inc. ("AEG") to become a new, independent, economically viable, and vertically integrated competitor in the market for primary ticketing services to major concert venues. AEG is the second largest promoter in the United States (behind Live Nation), promoting shows representing about 14% of concert revenues at major concert venues in 2008. No company other than AEG or Live Nation promotes concerts representing more than 4% of the concert revenues from major concert venues. AEG also owns, operates, or manages more than 30 major concert venues, representing about 8% of the capacity at major U.S. concert venues, and it can select (or influence the selection of) the primary ticketing company for those venues. In addition, AEG owns one-half of an important artist management firm with several popular clients, including Justin Timberlake and the Jonas Brothers. Due to its significant presence in promotions, venues, and artist management, AEG is the company best positioned to achieve the necessary scale, overcome the other entry barriers discussed above, and compete successfully with the merged form in the market for primary ticketing services to major concert venues.

The Final Judgment facilitates AEG's entry through a two-stage process that gives it access to Ticketmaster's core primary ticketing platform, which AEG can then use to service its own venues and to sell primary ticketing services to third-party venues. In the first stage, which must begin within six months of the proposed transaction's consummation and may continue for up to five years, the Final Judgment requires Defendants to provide AEG with its own branded website based on Ticketmaster's Host platform, including any upgrades and enhancements (the "AEG Site"). AEG has the right to use the AEG Site to sell tickets to events at specified venues it currently owns, operates, and manages as well as to events at any other venues from which AEG secures the right to provide primary ticketing services. Though

AEG must pay Defendants royalties for each ticket sold through the AEG Site, those royalties are below the average rate Ticketmaster currently charges, and Defendants have no control over AEG's final prices. These provisions immediately provide AEG incentives to compete with Defendants and diminish the risk that AEG would be unable to compete successfully had it attempted to deploy a less established primary ticketing platform.

The Final Judgment also requires Defendants to provide AEG with an option to acquire a perpetual, fully paid-up license to the then-current version of Ticketmaster's Host platform, including a copy of the source code, which Defendants must install and then support during the first six months after its installation. AEG is permitted to exercise this option within four years of the proposed transaction's consummation, which will allow AEG to assume full responsibility for operating its own primary ticketing business, independently of Defendants.

The Final Judgment gives AEG incentives to exercise its option to acquire a copy of Host (or to develop or acquire a competing primary ticketing platform) by prohibiting Defendants from providing primary ticketing services to AEG's venues after AEG's right to use the AEG Site expires. That provision is critical to preserving competition in the primary ticketing services market because it guarantees that, within five years, AEG will have to either supply its own primary ticketing services or obtain them from some company other than the merged firm. Because AEG cannot rely indefinitely on the AEG Site, it will have incentives to plan for the future. Even if AEG's plans do not involve exercising its option to acquire a copy of Host, the Final Judgment will preserve competition because AEG will have to contract for primary ticketing services with one of Defendants' rivals. AEG's ticket volume would give that primary ticketing company sufficient scale and credibility to compete effectively with the merged firm.

Second, the Final Judgment's requirement that Defendants divest Ticketmaster's entire Paciolan business will establish another independent and economically viable competitor in the market for primary ticketing services to major concert venues. Ticketmaster currently licenses its Paciolan platform both directly to venues representing 3% of major U.S. concert venue capacity and to other primary ticketing companies that sublicense the Paciolan platform to venues representing an additional 4% of the relevant market. Before consummating the proposed transaction, Defendants must enter a letter of intent to divest to Comcast-Spectacor, L.P. ("Comcast-Spectacor") the entire Paciolan business, including all intellectual property in the Paciolan platform and all contracts with venue and primary ticketing company licensees of that platform. Through its New Era Tickets ("New Era") subsidiary, which currently licenses the Paciolan platform from Ticketmaster, Comcast-Spectacor already provides primary ticketing services to venues representing 2% of major concert venue capacity. In addition to its interest in New Era, Comcast-Spectacor owns 2 major U.S. concert venues and manages 15 others. When combined with New Era's ticketing business and Comcast-Spectacor's venue presence, the Paciolan business that the Final Judgment requires Defendants to divest would provide Comcast-Spectacor sufficient scale to compete effectively and independently with the merged firm in the market for primary ticketing services to major concert venues. Comcast-Spectacor and others have contended that the movement in primary ticketing services will be towards "self-enablement" models, such as Paciolan, which allow a venue to manage its own ticketing platform.

Within 60 days of signing the letter of intent, the Paciolan business must be divested in such a way as to satisfy the United States in its sole discretion, and in consultation with the Plaintiff states, that the operations can and will be operated by Comcast-Spectacor or an alternative purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with any prospective purchaser. In the event that Defendants do not accomplish the Paciolan divestiture in a timely fashion, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

Third, the Final Judgment prohibits Defendants from engaging in certain conduct that would impede effective competition from equally efficient rivals that may or may not be vertically integrated. Thus, the Final Judgment proscribes retaliation against venue owners who contract or consider contracting for primary ticketing services with Defendants' competitors. The Final Judgment also prohibits Defendants from explicitly or practically requiring venues to take their primary ticketing services if the venues only want to obtain concerts the Defendants promote or concerts by artists the Defendants manage, and it likewise prohibits Defendants from explicitly or practically requiring venues to take concerts they promote or concerts by artists they manage if those venues only want to obtain the Defendants' primary ticketing services. These provisions preserve the ability of primary ticketing companies that do not also have access to content (and promoters and artist managers that do not also provide primary ticketing services) to continue competing with Defendants. Elsewhere, the Final Judgment prevents Defendants from abusing their position in the primary ticketing market to impede competition among promoters and artist managers by requiring that Defendants either refrain from using certain ticketing data in their non-ticketing businesses or provide that data to other promoters and artist managers. Finally, the Final Judgment mandates that Defendants provide any current primary ticketing client with that client's ticketing data promptly upon request, if the client chooses not to renew its primary ticketing contract. That provision reduces venues' switching costs and lowers barriers to other companies competing for Defendants' primary ticketing clients because it ensures that those venue clients will not be forced to relinquish valuable data if they decide to switch primary ticketing service providers.

Fourth, the Final Judgment requires Defendants to notify the United States at least thirty days before acquiring any assets of or any interest in any firm engaged in providing primary ticketing services in the United States, regardless of whether the acquisition would otherwise be subject to reporting pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, [15 U.S.C. § 18a](#). If the United States requests additional information within thirty days of the Defendants notifying it of an acquisition, the Final Judgment prohibits Defendants from consummating the acquisition until twenty days after providing the requested information. These provisions facilitate the vigilant and effective oversight that will be necessary to guard against the potential for Defendants to frustrate the purposes of the Final Judgment.

In short, the Final Judgment will eliminate the anticompetitive effects of the proposed transaction in the provision of primary ticketing services to major concert venues in the United States while preserving the possibility of efficiency-enhancing vertical integration in the concert industry and also preserving competition from Defendants' non-vertically integrated rivals.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, [15 U.S.C. § 15](#), provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, [15 U.S.C. § 16\(a\)](#), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment.

Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

John R. Read
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 4000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a settlement that would have required Defendants to divest the current set of divestiture assets to Comcast-Spectacor. The United States rejected that settlement because it would not have been as effective as the remedy embodied in the proposed Final Judgment at replicating the competitive dynamics that would have prevailed in the market for primary ticketing services had the proposed transaction not occurred.

As another alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Defendants' merger. The United States is satisfied, however, that the divestiture of assets and prohibitions of anticompetitive practices described in the proposed Final Judgment will preserve competition for the provision of primary ticketing services to major concert venues in the United States. Thus, the proposed Final Judgment would protect competition as effectively as would any remedy available through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." [15 U.S.C. § 16\(e\)\(1\)](#). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

- (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
- (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial

[15 U.S.C. § 16\(e\)\(1\)\(A\)](#) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as

the government is entitled to “broad discretion to settle with the defendant within the reaches of the public interest.” [*United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 \(D.C. Cir. 1995\)](#); see generally [*United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 \(D.D.C. 2007\)](#) (assessing public interest standard under the Tunney Act); [*United States v. InBev N.V./S.A.*, No. 08-1965 \(JR\), 2009-2 Trade Cas. \(CCH\) 176,736, 2009 U.S. Dist. LEXIS 84787, at *3 \(D.D.C. Aug. 11, 2009\)](#) (noting that the court's review of a consent judgment is limited and only inquires “into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.”).^[FN5]

FN5. The 2004 amendments substituted “shall” for “may” in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. Compare [15 U.S.C. § 16\(e\)](#) (2004), with [15 U.S.C. § 16\(e\)\(1\)](#) (2006); see also [*SBC Commc'ns*, 489 F. Supp. 2d at 11](#) (concluding that the 2004 amendments “effected minimal changes” to Tunney Act review).

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See [Microsoft](#), 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not “engage in an unrestricted evaluation of what relief would best serve the public.” [*United States v. BNS, Inc.*, 858 F.2d 456, 462 \(9th Cir. 1988\)](#) (citing [*United States v. Bechtel Corp.*, 648 F.2d 660, 666 \(9th Cir. 1981\)](#)); see also [Microsoft](#), 56 F.3d at 1460-62; [*United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37,40 \(D.D.C. 2001\)](#); [InBev](#), 2009 U.S. Dist LEXIS 84787 at *3 Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is “within the reaches of the public interest.” More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

FN6. Cf. [BNS](#), 858 F.2d at 464 (holding that the court's “ultimate authority under the [APPA] is limited to approving or disapproving the consent decree”); [*United States v. Gillette Co.*, 406 F. Supp. 713, 716 \(D. Mass. 1975\)](#) (noting that, in this way, the court is constrained to “look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass”). See generally [Microsoft](#), 56 F.3d at 1461 (discussing whether “the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the ‘reaches of the public interest’”).

[Bechtel](#), 648 F.2d at 666 (emphasis added) (citations omitted).^[FN6] In determining whether a proposed settlement is in the public interest, a district court “must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.” [SBC Commc'ns](#), 489 F. Supp. 2d at 17; see also [Microsoft](#), 56 F.3d at 1461 (noting the need for courts to be “deferential to the government's predictions as to the effect of the proposed remedies”); [*United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 \(D.D.C. 2003\)](#) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. “[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is ‘within the reaches of public interest.’” [*United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 \(D.D.C. 1982\)](#) (citations omitted) (quoting [*United States v. Gillette Co.*, 406 F. Supp. 713, 716 \(D. Mass. 1975\)](#)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); see also [*United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 \(W.D. Ky. 1985\)](#) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United

States “need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.” [SBC Commc'ns, 489 F. Supp. 2d at 17.](#)

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to “construct [its] own hypothetical case and then evaluate the decree against that case.” [Microsoft, 56 F.3d at 1459](#); *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 (“[T]he ‘public interest’ is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged.”). Because the “court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,” it follows that “the court is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the [United States did not pursue. Microsoft, 56 F.3d at 1459-60.](#) As this Court recently confirmed in *SBC Communications*, courts “cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.” [SBC Commc'ns, 489 F. Supp. 2d at 15.](#)

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.” [15 U.S.C. § 16\(e\)\(2\).](#) The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: “[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.” 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's “scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.” [SBC Commc'ns, 489 F. Supp. 2d at 11.](#)^[FN7]

FN7. *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the “Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone”); [United States v. Mid-Am. Dairymen, Inc., 1977-1 Trade Cas. \(CCH\) ¶ 61,508, at 71,980 \(W.D. Mo. 1977\)](#) (“Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should ... carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.”); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) (“Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.”)

VIII. DETERMINATIVE DOCUMENTS

In formulating the proposed Final Judgment, the United States considered the AEG/TM Technology Agreement, dated January 11, 2010 and attached hereto as Exhibit A,^[FN8] to be a determinative document within the meaning of the APPA.

FN8. The United States redacted competitively sensitive information and information unrelated to U.S. markets from the version of the AEG/TM Technology Agreement attached as Exhibit A.

Dated: January 25, 2010

END OF DOCUMENT